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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 28

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR CHICAGO, MILWAUKEE, ST. PAUL AND PACIFIC RAILROAD COMPANY, APPELLEE

STATEMENT

As a major competitor of the merger applicants,[1] Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) has been a key party throughout the 8-year proceedings before the Interstate Commerce Commission and the District Court. The active and vigorous competitiveness of the Milwaukee, the enhancement thereof by the protective conditions approved by the Commission,

[1] Great Northern Railway Company (Great Northern), Northern Pacific Railway Company (Northern Pacific) and Chicago, Burlington & Quincy Railroad Company (Burlington), collectively referred to as applicants.

and the extensive public benefits of those conditions have been attested to by hundreds of shippers and city, state and federal officials,[2] and by numerous briefs and arguments to the Commission and the District Court.

The Milwaukee intervened in the Commission proceedings in opposition to the merger as proposed, contending that it would be adverse to the public interest *unless* effective rail competition was assured by six protective conditions[3] which would enable the Milwaukee to realize its full competitive service potential.

The hearing examiner recommended that the merger be approved subject to three of the six conditions sought by the Milwaukee (App. 908). Exceptions to his recommendations were filed by applicants, Milwaukee, and other parties.

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[2] Including officials of the United States Department of Agriculture; Atomic Energy Commission; General Services Administration; the railroad regulatory agencies of Iowa, Michigan, North Dakota, Oregon, South Dakota, and Wisconsin; and the Province of British Columbia.

[3] These conditions, as summarized by the Commission, are:

(1) Establishment of through routes and joint rates via the new gateways of Fargo and Linton, N. Dak.; Miles City, Judith Gap, Great Falls, Bozeman, Butte and Missoula, Mont.; and Spokane, Seattle and Tacoma, Wash., on traffic interchanged at such junctions between the merged company and Milwaukee.

(2) Trackage rights for Milwaukee over the merged company's tracks between Longview Junction, Wash., and Portland, Oregon.

(3) Trackage rights for Milwaukee over the merged company's tracks between Renton and Snohomish, Wash., and between Everett and Bellingham, Wash.

(4) Extension of Milwaukee's service to Billings, Montana.

(5) Elimination of dual basis of switching charges in effect west of Twin Cities.

(6) Reestablishment of rate relationships affected by the merger (App. 329).

The Commission, by a 6 to 5 vote, denied the application for merger (App. 167). The majority noted that approval of the merger was inconceivable without reasonable assurance that the essential transportation services of the Milwaukee would be continued (App. 104), but that applicants had indicated the imposition of the sought conditions might preclude consummation (App. 328). The five minority members not only were interested in the continuation of the Milwaukee's services but in the opportunity offered by the merger to enhance Milwaukee's competitive position (App. 175, 180-181).

Applicants, upon rehearing, agreed to all of the Milwaukee's conditions and to conditions for other roads and for employees; subject thereto, the Commission approved the merger. When suits were brought by the Department of Justice (Department) and others to set aside the Commission's approval, the Milwaukee actively participated as an intervening defendant in brief and argument in full support of the decision of the Commission.

SUMMARY OF ARGUMENT

The Milwaukee is an active and vigorous competitor of the applicants, despite artificial and geographical handicaps which deprive it of a fair share of traffic moving to and from the Pacific Northwest.

With the six protective conditions requested by the Milwaukee and approved by the Commission, the Milwaukee will, for the first time, be able to compete on an equal basis for such traffic. Competition between the Milwaukee and applicants not only will continue but will be enhanced. Together with competition of other railroads and other forms of transportation, it will preclude any possibility of a monopoly for the merged company.

The protective conditions will also give shippers of a wide range of commodities free access to markets and sources of supply in the northern tier and Pacific Coast states from which they are now excluded or which they encounter difficulty reaching. As so conditioned, the merger is clearly consistent with the public interest, and the District Court's decision upholding the Commission's approval thereof subject to the Milwaukee's conditions should be affirmed.

ARGUMENT

I. STRONG INTRAMODAL AND INTERMODAL COMPETITION WILL REMAIN AFTER THE MERGER.

In its attack on the decisions of the Commission and the District Court, the Department contends that the elimination of competition requires a countervailing satisfaction of a serious transportation need or other important public benefit if the merger is to be found in the public interest.

Contrary to the Department's argument, active, vigorous, strong and effective competition, both intramodal and intermodal, throughout the territory served by applicants will remain after the merger.

A. Intramodal Competition.

1. *Competition from the Milwaukee.*

The Milwaukee is not a small railroad. It operates 10,596 miles in 13 northwestern and midwestern states (App. 106). In 1965 its railway operating revenues were $241,300,000 (App. 105). Milwaukee's density of traffic east of St. Paul and Sioux City compares favorably with that of the Burlington, but artificial and geographical handicaps limit Milwaukee's ability to participate in traffic to and from the

growing Pacific Northwest, resulting in a much lighter density of traffic for the Milwaukee than for applicants across the northern tier of states (App. 106, 108). These handicaps would be removed and the Milwaukee for the first time would be able to compete with the applicants, the Union Pacific and other railroads on equal terms for the long haul of all transcontinental traffic moving to and from the Pacific Northwest if the merger is approved subject to the six Milwaukee conditions.

It is not correct, however, as suggested by the Department, that the Milwaukee has provided applicants with only limited or weak competition (Department's brief, pp. 22, 50). First, as will be noted from the following tabulation, the Milwaukee is competitive with applicants in states and at major traffic generating points where the applicants often are wholly or partly noncompetitive with one another (App. 104; Ex. 88, Tr. 6351):

	Milwaukee	Burlington	Great Northern	Northern Pacific
IDAHO	X		X	X
Coeur d'Alene	X		X	X
ILLINOIS	X	X		
Chicago	X	X		
Moline	X	X		
Rock Island	X	X		
Rockford	X	X		
IOWA	X	X	X	
Council Bluffs	X	X		
Davenport	X	X		
Des Moines	X	X		
Dubuque	X	X		
Sioux City	X	X	X	
MINNESOTA	X	X	X	X
Duluth	X		X	X
Minneapolis	X	X	X	X
St. Paul	X	X	X	X
MISSOURI	X	X		
Kansas City	X	X		

	Milwaukee	Burlington	Great Northern	Northern Pacific
MONTANA	X	X	X	X
Billings	X[4]	X	X	X
Butte	X		X	X
Great Falls	X		X	
Missoula	X			X
NEBRASKA	X	X		
Omaha	X	X		
NORTH DAKOTA	X		X	X
Fargo	X		X	X
OREGON	X[4]		X	X
Portland	X[4]		X	X
SOUTH DAKOTA	X	X	X	
Aberdeen	X		X	
Sioux Falls	X		X	
WASHINGTON	X		X	X
Seattle	X		X	X
Spokane	X		X	X
Tacoma	X		X	X
Vancouver	X[4]		X	X
WISCONSIN	X	X	X	X
La Crosse	X	X		
Prairie du Chien	X	X		
Superior	X		X	X

The foregoing, of course, is only a partial tabulation of the 187 common points which the Milwaukee serves in competition with one or more of applicants (Ex. 88, Tr. 6351).[5]

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[4] Milwaukee does not presently serve Billings, Montana; Vancouver, Washington; or Portland, Oregon, but would do so under the conditions prescribed by the Commission.

[5] In its brief (p. 6), the Department states: "The Great Northern operates across the Northern Tier of states (Minnesota, North Dakota, Montana, Idaho and Washington) between Duluth and the Twin Cities and Seattle, Portland and Vancouver. The Northern Pacific operates across the same territory over routes lying somewhat to the south of the Great Northern's lines. Since the Northern Lines serve 'the same Pacific ports, the same lake ports, the same large eastern terminals, the same tier of States over parallel

Despite the great importance placed by the Department on the benefits of competition between the Northern Lines, the only specific example in its brief of better rail service created by competition is the improved transcontinental freight service which the Northern Lines have been compelled to operate in response to the faster service provided by the Milwaukee (Department's brief, p. 59). The record is replete with other examples of the Milwaukee's steps to provide improved competitive service, including construction of electronic gravity retarder classification yards for faster handling of cars and reduction of damage to shipments; yearly expenditure of millions of dollars for new freight car equipment; train-wayside radio and hot box detector systems; integrated car reporting and communication facilities; modern car repair facilities; and centralized traffic control. (Tr. 6722, 6723, 6229, 6231). To handle trilevel automobile cars, trailer on flat car shipments, and other excess dimension loads, the Milwaukee has lowered the floors of 32 tunnels in its main line between Chicago and the Pacific Northwest (Tr. 6232-6234). Other examples of the Milwaukee's initiative in competitive rate making, car supply, industrial development, special equipment, and trailer-on-flat-car service were furnished by Pacific Northwest shippers (Ex. 103, pp. 37-39).

The Department, itself, has demonstrated that the Milwaukee is indeed a real and not a weak competitor of applicants. Its counsel repeatedly inquired of shipper witnesses:

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lines, each line is the most aggressive and important competitor of the other.' "

The Milwaukee operates over the same tier of states serving the same lake ports, the same large eastern terminals, and the same Pacific ports except Vancouver and Portland, which it will serve under the conditions prescribed by the Commission.

> "Now based on your experience and knowledge, do you believe that the Milwaukee Road has to date been in active and vigorous competition with the applicant lines and its other rail competitors?"

Invariably, the answer was "Yes." (Tr. 8867; 8876; 8902; 8932; 8971; 9045; 9069; 9084; 9101; 9146; 9820; 10118; 10551; 10556; 11685; 12607; 13329; 13385). Other witnesses described Milwaukee's competition with applicants as "keen" (Tr. 9105); "healthy" (Tr. 10155); and "strong and effective" (Tr. 12620).

Some shippers stated as a reason for their support of the Milwaukee's conditions their interest in the Milwaukee *remaining* a strong competitor (Tr. 4571; 4837; 6195; 6959; 6983; 7126; 7640; 7713; 8816; 10537; 11654). Others, while not asked for an opinion of the Milwaukee's present competitive abilities, were confident that the conditions sought by the Milwaukee would render it fully competitive with the merged company (Tr. 4307; 5462; 5504-5505; 6195; 6208; 6571-6572; 6574; 6697; 6707; 6773; 6891; 6985-6986; 7100; 7662; 9022-9023; 10556; 13277).

The merger offers no threat to "control the price and character of interchange traffic, to drain off substantial amounts of shippers' business or in other ways to smother the competition" (*McLean Trucking Co.* v. *U.S.*, 321 U.S. 67, 89). Quite the contrary, as vividly expressed in the dissent of four Commissioners to the Commission's first report:

> "The impressive and startling, and discouraging, factor in the gateway statistics set forth in the report is not that, 'After merger, New Company would be the dominant transportation enterprise operating between the Northwest and Twin Cities' (*the affiliated Northern Line applicants are now*), but rather, the paucity of the Milwaukee's share of that market. Wringing hands over the Northern Lines' shares, separately or in combination, will not help the Milwaukee or its shippers or

> the areas it serves; using the leverage afforded by the applications, however, the Milwaukee could have the opportunity of increasing its share to the great benefit of the entire transportation system and the users thereof, even to reversing the trend of agricultural-commodity diversion to unregulated carrier services which threaten applicants and other regulated carriers alike." (App. 182).

The Department in a footnote to its brief (p. 54) suggests that the benefits to the Milwaukee from the six conditions awarded by the Commission may be overstated, charging that the Milwaukee's President testified in the Milwaukee-North Western merger proceeding[6] that, "taking into account the increased strength to be afforded the Northern Lines by their merger, the Milwaukee protective conditions would be of little or no avail."

The Milwaukee's President testified that the Milwaukee had presented evidence in the proceeding now under review that its annual traffic gains as a result of the six conditions would be approximately $8,000,000 after deducting costs of handling, which would exceed by some $3,000,000 the amount of traffic which the Milwaukee would expect to lose to the merged Great Northern, Northern Pacific and Burlington by reason of the improved service of the merged company.[7] The Commission, of course, had before it not

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[6] I.C.C. Finance Docket Nos. 24182, et al.

[7] He further stated that the Milwaukee had claimed an additional cost of about three million dollars for a new train which it would have to operate to be competitive. He then said:

> "We have since instituted and operate that train, so that, in terms of our earlier study, and based upon our earlier studies and not having made a subsequent study, the 3 million dollar additional expense which we originally envisioned would not be an additional expense now. So that the benefits of the merger, Northern Lines merger, based upon our earlier study would be about 3 million dollars." (Testimony of Mr. C. E. Crippen on February 8, 1967 in I.C.C. Docket No. F.D. 24182, et al., Tr. 433).

only the evidence available to and presented by the Milwaukee but also that presented by the applicant lines and Union Pacific. It was in the light of all such evidence that the Commission reached its conclusions as to the limits of the benefits and the increased competitive strength which the Milwaukee would derive from the conditions. The Department, in fact, concedes:

> "That the protective conditions imposed would benefit the Milwaukee is self-evident." (Department's brief, p. 52).

The Department attempts to counter this admission by arguing that the Northern Lines will also be strengthened, but this fact was taken into account in the Milwaukee's estimates and in the Commission's consideration, and can not further reduce the benefits (App. 129, 259).

Given an opportunity by the conditions to compete for the first time for the long haul of all traffic moving to and from the Pacific Northwest, the Milwaukee is confident that it will provide more and better competition for the merged company than the active and vigorous competition which it provides today for the individual applicants.

2. *Other Rail Competition.*

The Department brushes off rail competition via central and Canadian routes to and from the Pacific Northwest as inconsequential, stating that the Commission observed such routes to be circuitous (Department's brief, p. 45).

The most important of the central routes between Montana, Idaho, Washington, and Oregon, on the one hand, and the Midwest, East, and South, on the other, embrace the service of the Union Pacific west of Kansas City and Omaha and its connections east thereof. Their effectiveness

is reflected by the almost equal participation which the Union Pacific enjoys in traffic to and from the Pacific Northwest with the Great Northern and Northern Pacific (App. 146).

Further evidence of the competitiveness of the Union Pacific for traffic to and from the Pacific Northwest is found in its opposition to the Milwaukee's extension to Portland, Oregon. (App. 333) The competitiveness of the Central routes for Pacific Northwest traffic is also seen in the insistence of the Western Pacific and the Union Pacific upon conditions regarding Milwaukee's operation into Portland, which the Commission rejected as unduly constraining Milwaukee's transcontinental operations (App. 485). The Western Pacific's central route, which carries east-west transcontinental traffic to and from the Pacific Northwest, operates from the Great Northern's Bieber gateway to connections in Utah, and the Western Pacific also connects with the Santa Fe in California to form another transcontinental route. Similarly, the Southern Pacific competes for such east-west traffic via its lines from Portland into Utah and also via its long-haul southern route.

In addition to the competition among themselves, the United States railroads face competition of the Canadian Pacific and its Soo Line subsidiary. Pursuant to a traffic agreement between the Canadian Pacific and Soo, approved by the Commission in *Minneapolis, St. Paul and Sault Ste. Marie Railway Company Reorganization,* 252 I.C.C. 525 (1942), these two family lines work together closely to keep this traffic from their American competitors. (Tr. 9431). The Canadian Pacific-Soo routes to and from the Pacific Northwest compare favorably in distance with those of the Milwaukee, Union Pacific and applicants.

B. Intermodal Competition.

The Department dismisses intermodal competition across the northern tier of states to and from the Pacific Northwest. It points out that the long-haul low-rated products are not generally attractive to motor carriers and are entirely dependent upon rail transportation. It is obvious, however, that railroads must have high-rated as well as low-rated traffic to cover the full cost of their operations. It is for the high-rated traffic that the motor carriers most strongly compete, but as they succeed in diverting more and more of such traffic from the railroads, the railroad charges for handling the remaining traffic must inevitably rise, and the motor carriers will then divert increasing amounts thereof.

The Milwaukee has already suffered heavy losses from highway, waterway, and private carriage. Its annual freight revenues declined over $34,000,000 in the 10 years ending December 31, 1961 when the national economy was rapidly expanding (Tr. 6273). Under such circumstances the railroads, including applicants and Milwaukee, cannot cease in their efforts to maintain a high level of service and improve it wherever possible to prevent further inroads by intermodal competitors.[8]

In summary,(1) enhancement of the Milwaukee as an active and vigorous single-line competitor; (2) competitive central route and Canadian rail lines; and (3) fierce inter-

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[8] In its Report of Basic Policy Matters Under Consideration by the Interstate Commerce Commission to the sub-committee on Surface Transportation of the Senate Commerce Committee on June 24, 1969, the Commission recognized the continuing intensity of intermodal competition, stating (p. 89):

> "The keen competition among carriers as they struggle for larger shares of the available traffic stimulates the acquisition of new, larger, and specialized equipment; the search for new methods of pricing; and the means of providing more efficient service."

modal competition throughout the territory guarantee that the merged company will have to fight to retain its traffic against eager competitors.

II. THE MERGER, WITH MILWAUKEE'S CONDITIONS TO ENHANCE COMPETITION IN THE NORTHERN TIER, WILL PROVIDE MAJOR BENEFITS TO THE PUBLIC.

The Department, although acknowledging that the Commission has pointed to "primary merger benefits" of estimated cost savings to applicants and improvements of their service, contends that the Milwaukee's conditions are at best partial offsets to the curtailment of competition and that the Commission could not properly find in them any net advantage to the public interest (Department's brief, pp. 55-56). This contention, however, flies in the face of the Department's acknowledgment in footnote 40 (pp. 55-56) of the Commission's findings that one condition alone would "*** eliminate[e] artificial barriers to the development of new markets, services, and sources of supply ***" (App. 308), would "*** give many shippers a realistic choice of railroads for the first time in history ***" (App. 311), would add to competition in the areas affected, and would materially strengthen the disadvantaged Milwaukee.

It would seem strange that conditions which the Department asserts to be of no net advantage to the public interest should attract the support of shippers and public agencies across the country. A review of the Milwaukee's conditions and the public benefits thereof as confirmed by shipper testimony reveals the fallacy of the Department's position.

A. Open Gateways at Western Junctions.

This condition provides that where present routing is restricted to apply via the junctions of Minneapolis, St.

Paul, or Sioux City, alternate through routes[9] and competitive joint rates[10] shall be established for traffic interchanged between the merged company and the Milwaukee at Fargo and Linton, North Dakota; Miles City, Judith Gap, Great Falls, Bozeman, Butte, and Missoula, Montana; and Spokane, Seattle, and Tacoma, Washington.

Under this condition, a shipper could choose to route traffic at joint rates with interchange between the Milwaukee and the merged company at the Twin Cities or Sioux City, or at one of the designated North Dakota, Montana or Washington junctions.

This would permit the Milwaukee to solicit its longest practical haul over its lines west of the Twin Cities or Sioux City of traffic which it now must surrender or receive at those points. The merged company would have the same opportunity. This would also permit a selection by the shipper of alternate routes, as his needs require, over the lines of the Milwaukee and of the merged company and would give shippers and receivers on the Milwaukee advantages of diversion, reconsignment, stopoff, and transit privileges in addition to those that would become available to shippers and receivers on the merged company (Tr. 6429).

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[9] A "through route" is an arrangement, express or implied, between connecting railroads for the continuous carriage of goods from the originating point on the line of one carrier to destination on the line of another. *Chicago, M.St.P. & P.R. Co.* v. *U.S.*, 366 U.S. 745, 747, note (3).

[10] [T]he essential feature of a joint rate is that connecting roads have agreed or mutually consented to carry traffic from points on one road to points on another road for an aggregate charge which is less than the sum of their local charges between the same points. *Chicago, M.St.P. & P.R. Co.* v. *U.S.*, 366 U.S. 745, 747, note (4).

The Milwaukee's proposal of open western gateways struck a warm response, because of the creation of new competition and the direct benefits to the shipping public.

The United States Department of Agriculture emphasized the need of agricultural commodities for ready access to consuming and processing centers with the greatest degree of transportation fluidity and flexibility. It supported the opening of additional gateways, to afford producers, shippers and receivers adequate access to markets and to sources of supply (Tr. 10155). In its reply to the applicants' petition for reconsideration Agriculture stated that "considerable benefit could accrue to the agricultural community provided certain conditions were imposed that would open gateways to competing railroads thus creating more vigorous competition."

Individual shippers and receivers of agricultural commodities confirmed this need. Iowa Milling Company, a processor of 8,000,000 bushels of soybeans a year, located at Cedar Rapids, Iowa, has several small feed mills and dealers in the territory served by the Milwaukee, Great Northern and Northern Pacific, who cannot take full carloads of soybean meal. Cars are stopped to part unload at one point and move on to another. With the gateways opened, the shipper could combine a stop on the Milwaukee west of the Twin Cities with a final stop on the merged company (Tr. 4327; 4330). If the shipper routed a car for such stops today, the higher combination rates would apply instead of lower through rates which would be available after the merger with Milwaukee's conditions.

A manufacturer of prepared animal and poultry feed at Omaha, Sioux City and Des Moines, receiving thousands of cars of raw materials inbound annually, would be able, if the gateways are opened, to use Milwaukee's transit

credits,[11] upon which it is particularly reliant, to reach a greater number of marketing points than is now possible. Because of the present difficulty of shipping to points on other railroads with Milwaukee transit, many shipments go by truck instead of rail. Opening of the gateways would, therefore, enable the shipper to compete more effectively in a wider marketing area at less cost, and at the same time benefit all railroads by holding traffic to the rails (Tr. 4716-4718).

Spokane is an important inspection and diversion point for grain. A grain merchandiser, who brings grain to Spokane on the Milwaukee, cannot reach local Great Northern, Northern Pacific or Spokane, Portland, and Seattle Railway points except at high combination rates. Likewise, if the grain comes to Spokane on the Great Northern or Northern Pacific it cannot reach a Milwaukee local destination except at rate penalty. Opening the Spokane Gateway would be especially beneficial to him (Tr. 6937).

A Sanborn, Iowa, farmer and livestock feeder strongly supports the opening of the western gateways which will give him a shorter and faster route for the movement of his livestock from the west. Shipments originating on the Great Northern and Northern Pacific in Montana require one to two days longer to reach Sanborn via the Twin Cities than over the Milwaukee's direct route via Aberdeen, South Dakota. Opening western gateways would enable him to divert traffic originating on the merged company to the Milwaukee at Spokane, Missoula, Butte,

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[11] Inbound shipments to a processing point constitute transit credits which can be combined with outbound shipments to give the shipper the benefit of lower through rates. With the interior gateways closed, as they are today, an inbound shipment on the Milwaukee cannot be used as a credit against an outbound shipment on the Northern Lines.

Great Falls or Miles City to take advantage of the Milwaukee's shorter route. The time saved would often eliminate an additional feeding, minimize shrinkage in weight of the livestock, and lessen the likelihood of shipping fever and foot rot (Tr. 8819-8820).

Another shipper of livestock and of meat and packing house products is Geo. A. Hormel & Company, Austin, Minnesota. In forwarding carloads of canned meats from Austin to Montana and Washington, Hormel stops its shipments to partly unload at many points. Opening of western gateways, therefore, would be of direct benefit to Hormel by enabling it to combine stops on the merged company and the Milwaukee (Tr. 10724-10729).

Others to whom the opening of the western gateways is important are shippers of lumber and forest products, who testified that open gateways would result in:

(1) Faster service from the Pacific Northwest via the Milwaukee's Aberdeen, South Dakota route to Des Moines, Iowa; also faster service from the Pacific Northwest to Chicago, eliminating delays heretofore experienced in the interchange of cars between the applicant lines and the Milwaukee at the Twin Cities. Lumber customers are carrying smaller and smaller inventories, necessitating faster service (Tr. 4322-4323; 9151).

(2) Satisfaction of contractors' needs for delivery on team tracks nearest job sites (Tr. 6922).

(3) Ability to use Milwaukee's wide-clearance routes for high-wide loads (Tr. 6922).

(4) Combining of stops to part unload on the Milwaukee and the merged company by wholesale and retail lumber dealers (Tr. 6978; 13379).

(5) Access by lumber manufacturers on the Milwaukee in Idaho and Montana to sources of supplies on the

merged company from which they are now barred by combination rates, thereby extending to them the same benefits as to their competitors located on the merged company's lines (Tr. 7611; 12899).

(6) Ability to originate shipments on the merged company in the Pacific Northwest and complete loading on the Milwaukee in Washington, Idaho or Montana without a rate penalty (Tr. 8979).

Manufacturers, distributors and processors of other commodities also testified to the benefits of the open gateways sought by the Milwaukee.

Amana Refrigeration, Inc. of Amana, Iowa, a manufacturer of refrigerators, air conditioners and other refrigeration appliances, served exclusively by the Milwaukee, would be benefited if able to stop cars at Milwaukee points with final destination on the merged company in the West (Tr. 4304).

Pittsburgh-Des Moines Steel Company has plants at Clive and Des Moines, Iowa on the Milwaukee and on a Milwaukee subsidiary. This company is continuously faced with the problem of shipping excess-dimension loads to the Pacific Northwest. Steel fabrication is trending toward large size pieces, such as cylinders 14′ in diameter and bridge girders, 120′ long and 14 to 16 feet high. The only available wide-clearance route for these shipments to the northwest is the Milwaukee's route via Aberdeen, South Dakota. Opening the western gateways would enable such shipments for the first time to move over such route at competitive rates to points on the applicants' lines (Tr. 4315-5318).

A wholesale distributor of electrical appliances at Spokane receives 125-150 rail car shipments annually from Indiana, Michigan and Minnesota. Although the Milwaukee

has given the best service from Chicago, this shipper has been unable to give the Milwaukee a fair share of the traffic because many part-unload shipments requiring stops in transit must also stop at points on one of the applicant lines not served by the Milwaukee. This shipper's transportation requirements require the widest possible routings by the western carriers serving its warehousing facility at Spokane. It has dealers in Oregon, Idaho, Montana and Washington. If Spokane were an open gateway, and the outbound carriers' selection not dependent upon the inbound carriers used, it could go into the storage in transit business, increase its sales, lower its freight charges and make its dealers in the outlying areas more competitive with appliance dealers in the large cities (Tr. 7661-7644).

Kimberly-Clark Corporation, Neenah, Wisconsin, is a large manufacturer of paper and paper products, operates several pulp mills, and has a considerable investment in the lumber business on the West Coast and elsewhere. Its transportation bill is in excess of $50,000,000 per year and it uses every important railroad in the United States and Canada. It has made extensive use of all of the applicant lines, as well as the Milwaukee (Tr. 8561-8566). Present routing restrictions have proved a handicap in many instances. These difficulties will increase unless there is more liberality accorded the shipping public to take advantage of the service and direct physical connections between the Milwaukee and the merged company west of the Twin Cities. The ability to load a stopover car for partial unloading is of more importance today than ever before, particularly in sparsely settled areas served by the applicant lines and the Milwaukee. Railroads are building larger and larger box cars. More than 20% of the box cars supplied consist of cars 50′ or more in length.

Some railroads are now ordering box cars 60′ in length. With the larger equipment, the need for stopover cars increases proportionately, as many customers cannot take a full 50 or 60-foot car, thus making it necessary to split cars between two or more customers. More liberality in routing of traffic would serve the public need, and the advantage of transit privileges would probably create new markets for many products. Accordingly, Kimberly-Clark supports the Milwaukee's request for open gateways (Tr. 8566-8568).

General Electric Company (Hot Point Division) manufactures major household appliances, such as refrigerators, air conditioners, dish washers, disposal units, washing machines and electric ranges at Chicago and Milwaukee. Total outbound movement from Chicago was 7,733 cars and from Milwaukee 1,500 cars in 1961. Of the total, 1,200 carloads moved to the Pacific Northwest. Approximately 35% of this traffic moved in stopoff cars enabling individual dealers to receive shipments. The Milwaukee's request for open routing via western junctions, if granted, will be especially helpful for stopoff cars. Presently, stops must be confined to the route of a single railroad, precluding a combination of stops such as Harlowton, Montana on the Milwaukee, and Helena, Montana on the Northern Pacific without a rate penalty (Tr. 8880-8882). The character of General Electric business has been changing rapidly in the last three years. The cost of warehousing distribution points is becoming very excessive. It has tried to develop a type of distribution that bypasses large field distribution warehouses. It has been very successful in this in the East and Southeast where there are not as many routing restrictions. In the Northwest, however, the routing restrictions have hampered the development of this program. The volume

of stopoff cars has increased from 5%, three years ago, to approximately 35% of the total volume of business out of Chicago (Tr. 8896).

National Tea Company owns and operates 897 retail supermarkets; 13 regional distribution centers at Denver, Colorado; Sioux City, Iowa; Hopkins, Minnesota; Milwaukee, Wisconsin; Davenport, Iowa; St. Louis, Missouri; Baton Rouge, Louisiana; New Orleans, Louisiana; Mobile, Alabama; Memphis, Tennessee; Indianapolis, Indiana; Detroit, Michigan, and Chicago, Illinois; a meat packing and processing plant at Denver; and meat packing plants at Fergus Falls, Minnesota and Port Huron, Michigan. Sales in 1961 amounted to $888,000,000. In 1961, National Tea shipped 18,988 cars, a large proportion of which moved eastbound from the West to its regional distribution centers. The principal commodities were fresh fruits and vegetables, canned goods, canned fish, frozen fruits and vegetables, coffee, flour and paper products, originating in Arizona, California, Texas, Kansas, Missouri, Colorado, Arkansas, Washington, Oregon, as well as canned pineapple from the Hawaiian Islands. Included in its transcontinental traffic, is an extensive movement northbound from California origins to Oregon and Washington to complete loading of various commodities. Approximately 6,000 of the 18,988 railroad cars shipped in 1961 moved to various divisional distribution warehouses over the Milwaukee. From origins on the Great Northern and Northern Pacific, the Milwaukee participates only east of the Twin Cities (Tr. 9020-9022). Opening of western gateways, as proposed by the Milwaukee, should eliminate a delay of at least one day which National Tea Company encounters on shipments interchanged by the merging lines at the Twin Cities with the Milwaukee, and provide an improved service to its six dis-

tribution warehouses served by the Milwaukee at Milwaukee, Wisconsin; Hopkins, Minnesota; Davenport, Iowa and three warehouses at Chicago. If the merged company and the Milwaukee could each solicit the long haul on traffic west of the Twin Cities, there would be a greater incentive for each carrier to improve its service, and National Tea could select the carrier best suited to its needs. For these reasons, National Tea supports the opening of through routes via western gateways as requested by the Milwaukee (Tr. 9023-9024).

Removal of the routing straight-jacket resulting from the applicants' present insistence on the long haul west of the Twin Cities is requested by Montgomery Ward & Company, Chicago, which strongly supports the Milwaukee's open gateway condition. This shipper, with a 40,000-50,000 annual carload volume and a freight bill exceeding 70 million dollars, requests elimination of the routing restrictions which confine it

> "to a single line west of the Twin Cities so that we cannot route a car with free choice of alternative services. That is, a car that originates east of St. Paul destined to a local point on the applicant lines may not be routed so as to give the Milwaukee Road a line haul beyond the Twin Cities unless we ridiculously pay rate penalties." (Tr. 9125, 9126).

A manufacturer of power cranes and power shovels, at Waverly, Iowa, often makes shipments which are stopped to part unload. Because of inability to reach Great Northern or Northern Pacific points with shipments routed west of Minneapolis-St. Paul via the Milwaukee, it seldom favors the Milwaukee with stopoff shipments. Opening of the western gateways at competitive joint rates would permit it to select either the Milwaukee or the merged

company for the haul west of the Twin Cities and thereby reach nearly any point with a dropoff shipment without a rate penalty (Tr. 10749-10750).

Allis-Chalmers Manufacturing Company, West Allis, Wisconsin, manufactures large heavy machinery, road-making machinery, agricultural implements, tractors and other machinery and industrial equipment. It has 17 plants in various states, ships to all of the United States as well as foreign areas and has a transportation bill of 25 million dollars a year. It has branches in Fargo, North Dakota; Billings and Butte, Montana; Portland, Oregon; and Seattle and Spokane, Washington. Until recently the preponderance of tonnage to territory west of the Twin Cities went to its branches. The tendency now is to do less warehousing and ship more to the dealers. Hence Allis-Chalmers needs more stopover privileges. Accordingly, it would be beneficial to Allis-Chalmers if the Milwaukee could participate in rates and routes with an interchange of traffic to the applicant lines at points west of the Twin Cities (Tr. 10853-10857).

The largest canner of fruits and vegetables in the world, the California Packing Corporation, most of whose production is marketed under Del Monte label, also requests the opening of the Washington and Montana Gateways between the Milwaukee and the merging lines. This company has plants on, and is a substantial shipper of carload traffic over, both the merging lines and the Milwaukee. In explaining its support for the opening of gateways in Washington and Montana, it summarized the benefits to the shipper as follows:

> "This would guarantee a fair measure of competition between all lines and insure a high level of service at noncompetitive stations. It would give northwest

shippers and receivers a choice of routes and would allow them to favor those carriers which provided the most satisfactory service and furnished an adequate and dependable supply of suitable equipment. It would further improve stopoff possibilities for shippers and receivers and make rail transportation services more valuable." (Tr. 14183-14186).

As this testimony indicates, the gateways condition would open the gateways for all shippers on all commodities, thereby increasing present and creating new competition regardless of whether a particular shipper of a particular commodity has some special need for an open gateway.

Other shippers who testified to benefits from the Milwaukee's open gateway condition are an Everson, Washington, vegetable canner (Tr. 6758-6763); a Lynden, Washington, fruit and vegetable processor (Tr. 6763-6771); a Lynden, Washington, cold storage warehouse (Tr. 6771-6777); a Spokane, Washington, iron and steel fabricator (Tr. 7746-7747); a Green Bay, Wisconsin, paper towel manufacturer (Tr. 8848-8868); a Northbrook, Illinois, water-softener manufacturer (Tr. 8933-8944); a Minneapolis, Minnesota, potato broker (Tr. 10536-10552); a Minneapolis lumber wholesaler (Tr. 10553-10562); and a Fargo, North Dakota, building material and paint wholesaler (Tr. 11734-11742).

B. Trackage Rights—Longview Junction-Portland.

As a second condition to the merger, the merged company would grant to the Milwaukee trackage rights for the operation of its freight trains between Longview Junction, Washington, and Portland, Oregon, on reasonable terms, including the equal right to serve all present and future industries at intermediate stations. These trackage rights would include the use of the merged company's facilities at Portland necessary for the switching of traffic to other

railroads and industries. The merged company would also maintain Portland as an open gateway with the Milwaukee on the same basis as with other connecting lines (Tr. 6425).

This condition will permit the Milwaukee to participate as a single-line carrier between all points on its lines north and east of Longview, on the one hand, and Portland and intermediate points, on the other, with the same ability to provide faster service and through rates as the merged company. The public will also have an alternate transcontinental route, competitive with the merged company, between Chicago and Portland, and the Milwaukee will become able to establish rates independently of its competitors to and from such points as Portland, Oregon and Vancouver, Washington (Tr. 6425; 6425).

If granted access to Portland, the Milwaukee could also negotiate rates with connecting lines at Portland to, from and via Oregon and California, broadening the market and transit points for shippers and receivers on its lines and the lines serving Oregon and California. This would permit transit and stops to complete loading or part unload at all Milwaukee points north and east of Portland on traffic originating south thereof moving over the Milwaukee. In the opposite direction, there would be transit and stops in Oregon and California for traffic originating on the Milwaukee moving to points south of Portland. The result would be that the Milwaukee's car supply would be readily available to shippers at Portland, Vancouver, Kalama, and points in Oregon south of Portland on the Southern Pacific and other connecting lines when loaded for movement over the Milwaukee (Tr. 6426-6427).

The testimony of scores of shippers, large and small, leaves no doubt that access to Portland by the Milwaukee would be not only in the public interest but would satisfy

several urgent public needs. One of these needs is to make the Milwaukee an effective rate-making line on traffic to, from, and via Portland. A small grain shipper, Farmers Co-operative Elevator Company of Denton, Montana, shipping from 200 to 300 cars of grain each year, supporting the Milwaukee's proposal for trackage rights to Portland, said:

> "Our elevator at Denton is completely dependent upon the Milwaukee for car supply and train service . . . Our recent experience has been that the Milwaukee Road has been powerless to make westbound grain rate adjustments to meet the inroads of truck competition in this area. We have been forced to provide truck loading facilities at our elevators to remain competitive, although we prefer to use rail service as it is much more satisfactory for handling grain to market. If the Milwaukee is to remain competitive in the transportation of grain from this area it must be able to act independently of the other railroads in making rates and providing service to this important tidewater market." (Tr. 13338-13339).

Anderson Grain Company, Great Falls, Montana, owns and operates 35 elevators on the Milwaukee and Great Northern in Montana. It is a medium-size shipper of between 1500 and 2000 cars of grain a year. A witness on its behalf testified:

> "We particularly support the Milwaukee extension of lines into Portland over the merged companies' tracks. The lack of direct entry into Portland reduces the effectiveness of that line in rate negotiation matters. The present arrangement automatically forces concurrence of the intermediate line in any divisions and routing establishment between the Milwaukee on the one hand, and the Southern Pacific and other California lines, on the other hand. The intermediate road, the Union Pacific, serves an important grain origin territory from its stations at Dillon, Montana, and

Ashton, Idaho. The movement from Ashton in recent seasons has been substantial. Since this Ashton and Dillon revenue is important to the Union Pacific, it is natural for that line to weigh carefully the overall effects on its total grain revenue when considering participation as a bridge carrier on through rates via other gateways. We believe the effect on rate adjustment negotiations due to the above situation could and should be relieved if authority is granted the Milwaukee to enter Portland over existing railroad right-of-ways by contracting with owner lines for trackage use on the same basis now utilized by other carriers on the route between Seattle and Portland (Tr. 13312-13313).

A large shipper, Fisher Flouring Mills Company, Seattle, Washington, which handles 11,396 carloads of grain and grain products a year, similarly testified that a condition enabling the Milwaukee to have a completely competitive route to Portland would benefit that shipper by the Milwaukee's increased effectiveness in rate negotiation matters. This shipper has been placed at a competitive disadvantage, where another carrier, for example, the Union Pacific had been reluctant to join in rate adjustments of movements of grain from points on the Milwaukee in Montana and Idaho through Seattle and to California via Portland when it had been enjoying the major share of traffic over its own line from the origin territory directly to California. This adverse effect on rate adjustment negotiations could and should be relieved (Tr. 6523-6526).

Additional support for the Milwaukee's entry into Portland comes from Crown Zellerbach Corporation, San Francisco, the second largest producer of paper and paper articles and wood pulp in the United States, with a major portion of its production in the Pacific Northwest. Two of its major paper plants, and a levulinic acid plant under construction, are located on the Olympic Peninsula and

served by the Milwaukee. Crown Zellerbach has a very vital interest in seeing that the Milwaukee is able to function as a strong competitive force in the railroad group serving the Pacific Northwest (Tr. 6569-6571).

In explaining its support of the Milwaukee's entry into Portland, Crown Zellerbach points to the necessity of competitive rate adjustments from the various Northwest mills via all railroads including the Milwaukee and its connections and to the responsibility of the Milwaukee to keep the Olympic Peninsula mills competitive (Tr. 6573-6574).

Time in transit from the Olympic Peninsula mills to California in connection with the Milwaukee via Chehalis, Washington, is substantially longer than other routes, and only shipments of wrapping paper on which delivery requirements permit longer transit time move via this route. This limits the competitive opportunity of the Milwaukee in soliciting traffic south of Seattle. Routing on paper bags and pulp board via Chehalis to California is not available at all. As a shipper utilizing all rail lines serving the Northwest, Crown Zellerbach concludes:

> "It would greatly strengthen the rail competitive picture, not only from a service consideration but also from a rate-making standing, if the Milwaukee were accorded operating rights to Portland, Oregon." (Tr. 6571-6572).

The National Tea Company gives a further illustration of public benefit if the Milwaukee is granted access to Portland. Cars of canned salmon, soups or vegetables, or frozen fruits and vegetables, originating at Sacramento, California, moving over the Western Pacific-Great Northern, or Southern Pacific-Northern Pacific to Seattle, for completion of loading on the Milwaukee, are

delayed at least two days because the cars must be switched over to the Milwaukee at Seattle for switching into National Tea's plant. After completion of loading, the Milwaukee must then switch the cars back to the outbound carrier. If the cars were delivered to the Milwaukee at Portland, it could spot the car at the plant at Seattle on the day of arrival, permitting departure eastbound via the Milwaukee that same evening (Tr. 9022-9023).

Other shippers, who favor the merger and the Milwaukee's entry into Portland, are members of the Washington-Oregon Shippers Cooperative Association, Pacific-Northwest Shippers Cooperative Association, Washington Potato and Onion Growers and Shippers Association, Northwest Furniture Manufacturers Association, Canadian Peat Moss Industry, and Northwest Fish Traffic Committee (Tr. 7191; 7204). They point out that stopoff cars to serve Portland are a rule, not an exception, on a vast amount of general merchandise traffic. This is especially true in recent years as railroad carload minimums have been greatly increased under "incentive rates", while shippers desire lower and lower inventories. The result has been a great increase in stopoffs involving Portland with Seattle, Tacoma, Spokane and other points. (Ex. 103, pp. 32, 33).

The Milwaukee's service to Portland via Marengo, Washington, thence Union Pacific, is one day to two days slower than by any other competitor on transcontinental freight. For three years, Washington-Oregon Shippers Cooperative Association has used the Milwaukee-Union Pacific to Portland via the Marengo, Washington gateway. Never has service been better than one day longer than routes via the Union Pacific or the applicants. A direct access to Portland by the Milwaukee will enable the 30 members in Portland of the Washington-Oregon Shippers Cooperative

Association to obtain competitive service that they cannot get today without withdrawing 100% of their business from the Milwaukee. (Ex. 103, pages 33, 34).

Lack of access to Portland by the Milwaukee has also caused rate and service handicaps to lumber and plywood companies at Port Angeles, Washington, that are dependent upon the Milwaukee for rail service. Rates from Port Angeles on lumber to California are higher than from competing origins in western Washington. Time in transit is also a handicap. The California market is becoming more and more important to mills in the Port Angeles area. Moreover, there are no routes to the east via Oregon and California from Port Angeles, which prevents sales to mills at Vancouver, Washington, Portland, Oregon and points south for remanufacture in transit on eastbound movements, which privilege is available to many competitors in western Washington. If the Milwaukee were permitted operating rights to Portland, it could be a competitive rate-making line with its connections beyond, and more favorable rates, additional routes and faster transit time would be expected (Tr. 6681-6683; 6690-6691).

The shortage of wide-door box cars is the subject of complaint to the railroads, particularly by shippers in Oregon, now the principal lumber producing state in the Pacific Northwest. If the Milwaukee is given access to Portland, shippers in Oregon would have access to its car ownership, including 5,494 wide-door box cars. The Milwaukee, as a rule, has sufficient equipment on line to supply its shippers and some to connecting lines for eastbound loading via its line. In addition to making available cars which the Milwaukee would bring into Portland for unloading, it would have a stronger incentive to haul empty cars to the Pacific Northwest for loading east if given the opportunity of a long haul from Portland (Tr. 6277-6278).

The critical need for the car supply of the Milwaukee at points in Washington, south of Longview Junction and in Oregon is confirmed by the testimony of various shippers in southern Washington and Oregon who support Milwaukee's Portland entry to improve their car supply, *e.g.*, the owners of 35 forest products mills, members of Southwest Oregon Shippers Traffic Association located in southwest Oregon, shipping 47,400 cars annually (Tr. 5433-5434); a seed processor, shipper of 200-300 cars annually (Tr. 5494-5496); a shipper of plywood from Vancouver, Washington, which has experienced a very serious shortage of double-door cars, the demand for which is increasing due to greater use of mechanical loading (Tr. 6889-6891); and a Silverton, Oregon, canning company which ships between 350 and 400 cars of canned goods per year, and whose needs for damage-free or compartmentizer cars, the applicants cannot consistently fulfill (Tr. 13244-13245; 13248).

C. Trackage Rights—Renton-Snohomish and Everett-Bellingham, Washington.

The Milwaukee's route north of Seattle to the Canadian border includes a branch line to Everett leaving its main line east of Seattle, at Cedar Falls. It also includes a line, which is isolated from the rest of the Milwaukee's system, starting at Bellingham and extending north to the Sumas-Huntington International gateway and eastward to Maple Falls, Washington. Originally the Milwaukee provided service at through rates between its main line and its Bellingham line through a car-barge link which it operated on Puget Sound between Seattle and Bellingham. In recent years, this car-barge operation was replaced by an operating arrangement with the Great Northern, under which the Great Northern handles in its trains the Mil-

waukee's cars between Everett and Bellingham. The agreement is cancellable by either party (Tr. 6429-6430; 6629).

Cars originating or terminating on the Bellingham-Maple Falls line, or interchanged at Sumas, must be interchanged at Bellingham and again at Everett, under the present operating arrangement, and move between Everett and the Milwaukee's main line at Cedar Falls, Washington, thence east towards the Twin Cities or west to Seattle-Tacoma. Traffic to Portland and beyond must again be interchanged north of Portland with the Union Pacific at Chehalis, Washington. The resulting service is so slow that it is impossible for the Milwaukee presently to compete effectively for traffic so interchanged (Tr. 6430).

If granted these rights, the Milwaukee could provide a competitive service to and from Everett, Bellingham and points on its line north of Bellingham (Tr. 6431).

With the requested trackage rights between Renton and Snohomish, the Milwaukee could avoid the use of its 39-mile longer route via Cedar Falls for north-south traffic, and together with trackage rights between Everett-Bellingham and Longview Junction-Portland, would enable the Milwaukee to offer a schedule comparable to the 15-hour 30-minute overnight schedule of the merged company between Sumas and Portland (Tr. 6630).

The benefits to the public of the trackage rights sought by the Milwaukee between Renton and Snohomish and Everett and Bellingham extend beyond the United States to Canada. The Province of British Columbia intervened and presented testimony through the Transportation Economist, Bureau of Economics and Statistics, Department of Industrial Development, Trade and Commerce. The department and its Minister of Industrial Development, Trade and Commerce believe that maintenance of Milwau-

kee's competition at the Sumas gateway is of great importance (Tr. 13222-13223).

British Columbia has always been dependent on rail facilities for the development of its economy. The Province is the owner of two railways, the British Columbia Electric and the Pacific Great Eastern (Tr. 13223, 13225). British Columbia's growth has kept pace with the State of Washington throughout its early history, but since 1920 has increased at a more rapid rate. The southwest corner of British Columbia holds the major portion of its population (75%). Within 900 miles to the south, there are 1.7 million people. Within the same distance to the east there are only 124.6 thousand people. It is to the south that the predominantly primary industries of the province must, as the province develops, look for sources of supply (Tr. 13227-13228).

Shippers are interested in an improvement of Milwaukee's service to and from Everett and points north, and request the Commission's approval of the Renton-Snohomish and Everett-Bellingham trackage rights by which such improved service could be given.

A grain merchandiser originates grain in Washington, Oregon, Idaho, Montana, British Columbia and the Midwest. Once this company has an order from a mill or feed dealer it must be moved promptly. The more destinations to which the grain may move, the more opportunities this company has to sell it, whether it is for milling, storing or blending in transit, or moves direct to a feed dealer. This shipper sells a substantial amount of grain going to Bellingham, Lynden, (a point north of Bellingham) and other points in that area. It has often been able to buy a carload of grain on track at Spokane or bring it to Spokane for inspection for delivery to Bellingham, but if it had a Mil-

waukee origin the shipper could not place the order because the Milwaukee's service was too slow to meet the customer's needs. There have been times Milwaukee-originated grain was available without paying a premium, and this shipper was unable to fill its customer's orders promptly and lost sales. It, therefore, favors an improved operating route for the Milwaukee to Bellingham (Tr. 6935-6936).

Another shipper who suffers from the present delayed service of the Milwaukee north of Seattle, is a ladder manufacturer at Kent, Washington, located between Seattle and Tacoma, and served by the Milwaukee and Union Pacific. Inbound lumber comes by rail from British Columbia and any delay in transit subjects the lumber to damage due to checking and splitting. Particularly in the spring and summer months, the element of transit time is critical on the damp lumber as the longer the lumber is exposed to heat in the cars, the greater the financial loss in the material. This company also asks that the Commission grant the trackage rights sought by the Milwaukee to afford it a practical service route to Sumas (Tr. 6985, 6986).

Other shippers supported the Milwaukee's request for Renton-Snohomish and Everett-Bellingham trackage rights to enable it to provide a better service than now available (Tr. 4327; 5460; 6763; 8808; 8837; 9150; 10553; 14229; 14248; 14262).

D. Handling of Traffic of the Milwaukee from, to and through Billings, Montana.

This condition requires that the merged company shall impartially handle on fair and reasonable terms cars for the Milwaukee, from, to and through Billings, Montana, as a station on the Milwaukee to be delivered to and re-

turned by the merged company at Miles City, Judith Gap, or Bozeman, Montana, including the switching of such cars to or from industries at Billings (Tr. 6432, 6433).

Billings, Montana is one of the two most important cities in the state. It is a growing manufacturing and jobbing point, serving an extensive marketing area. Although the Milwaukees serves the area 35-40 miles north of Billings, it has no line into Billings. Between Billings and many origins and destinations on the Milwaukee, competitive with both the Great Northern and Northern Pacific, *e.g.*, Minneapolis, St. Paul, Butte, Spokane, Seattle and Tacoma, the Milwaukee does not participate in traffic. The same is true with respect to Billings traffic originating or terminating on any West Coast connection of the Milwaukee (Tr. 6432).

Shippers of various commodities support the Milwaukee's request that Billings be made a station on its line for several reasons. Tri-State Food Brokers, Inc., Billings, Montana is a sales agent for 20 brand-name food packers and manufacturers and sells direct to wholesalers and chain store distributors. The wholesalers and distributors have warehouses at various Montana points, including Billings. This company controls the routing on all of its business originating in the east in Indianapolis, Chicago, Lawrence, Kansas and points in Michigan, and in the west at Los Angeles, San Francisco and Portland. It ships annually approximately 200 cars to the warehouses in Montana and Sheridan, Wyoming, using the tariff privilege of stopping cars at intermediate points to part unload for about 80% of its business. This shipper desires to combine stops at Billings and at points on the Milwaukee and asks that Billings be made a station on the Milwaukee through a reasonable operating arrangement (Tr. 13988-13989).

Thirty-five per cent of General Electric's 1200 carload shipments a year from Chicago and Milwaukee to the

Pacific Northwest are stopoff shipments. Billings is an important stopoff point, and General Electric favors it becoming a station on the Milwaukee to enable the combining of stops at Billings with stops at local points on the Milwaukee, such as Harlowton, Montana, Moses Lake or Othello, Washington (Tr. 8881-8882). General Hardwood Company, Tacoma, Washington, lumber and plywood wholesale distributor, has received a number of cars at Tacoma, requiring partial stops in transit to unload throughout Montana and Washington. It has acquired a new customer in Billings, who is taking shipments of less than a carload, requiring stops for partial unloading at that point. It would be very helpful to be able to stop cars at Billings, Montana, as a point on the Milwaukee with final stop at Tacoma, Washington, where this shipper is dependent upon the Milwaukee for all of its switching services (Tr. 6977-6979).

Also, in support of the Milwaukee's request that Billings be made a station on its line through the proposed operating arrangement with the merged companies, in order to combine stops at Billings with stops on the Milwaukee, are Culligan, Inc., Northbrook, Illinois, water conditioner manufacturer (Tr. 8936); Geo. A. Hormel & Company, Austin, Minnesota (Tr. 10726); Schield Bantam Company, Waverly, Iowa (Tr. 751); and Pacific Hide and Fur Depot, Incorporated, Great Falls, Montana (Tr. 13362-13363).

Nixon and Company manufactures prepared animal and poultry feed at plants in Omaha, Sioux City, and Des Moines, at which it receives approximately 2500 to 3000 inbound carloads of raw materials per year. These raw materials are manufactured in transit, and the various animal and poultry feeds move outbound on transit rates. The chief distribution areas for the company's products are Montana, South Dakota and North Dakota. The out-

bound movement of feed by rail is approximately 750 to 900 carloads per year, the balance moving by truck. When there is more Milwaukee grain at Sioux City than needed for shipment to Milwaukee points, it is necessary that customers send in trucks to pick up the feed. This shipper supports the Billings condition proposed by the Milwaukee so that it can reach Billings via the Milwaukee at the through rate from Milwaukee origins instead of the higher combination rate applicable when such grain moves to Billings via applicants (Tr. 4716-4718; 4720-4725).

F. H. Peavey & Company, Minneapolis, Minnesota owns country grain elevators at 225 points in Minnesota, North Dakota, South Dakota and Montana, grain terminal elevators, wheat and rye flour mills in 7 states and 29 lumber yards. One of its mills is located in Billings, Montana, and one reason it supports the merger is to enable it to draw wheat from the area north of Billings served by the Great Northern to its mill at Billings, thence to points beyond over the present Northern Pacific's lines, eliminating back haul mileage over the Great Northern (Tr. 3660-3661; 3663-3664). The Milwaukee also serves a substantial portion of the wheat growing area north of Billings. It would be beneficial to this shipper if the Milwaukee could also provide transportation of grain from this area to Billings for milling and thence to Seattle-Tacoma and Portland at competitive rates (Tr. 3672). This will be accomplished if the merger with the Billings condition becomes effective.

E. Reestablishment of Rate Relationships.

The purpose of this condition is to extend to shippers or receivers on the Milwaukee the benefit of the same rate reductions on joint line hauls involving the Milwaukee and the merged company as will be enjoyed by shippers presently using a combination of the applicant lines. For

example, the Roundup Mining Company of Roundup, Montana mines and ships 58,000 tons of coal a year. It is completely dependent upon the Milwaukee for rail service and without good rail service could not exist. It is particularly interested in maintaining rate relationships with competitors. A competitor at Sheridan, Wyoming on the Burlington can deliver coal to East Helena on the Northern Pacific on a two-line rate and this shipper likewise pays a two-line rate to the same destination. After the merger, two-line rates between points on the applicant railroads will become lower single-line rates. The Roundup shipper will then be on a higher basis of rates than its competitors. It, therefore, supports the Milwaukee's proposal that where lower single line rates via the merged company replace higher two-line rates via applicants, reductions also be made in two-line rates via Milwaukee and the merged company to provide equal treatment to the Milwaukee's shippers. (Tr. 14002-14005).

Additional support for this condition by shippers and receivers on the Milwaukee who would gain the benefits of the single-line level of rates came from American Crystal Sugar Company, Denver, Colorado, sugar refiner (Tr. 3358); Scott Paper Company, Philadelphia, Pennsylvania, paper manufacturer, (Tr. 7974); Hallett Construction Co., Duluth, Minnesota, highway construction contractor (Tr. 9504); and Dakota Salt & Chemical Company, Williston, North Dakota, salt producer (Tr. 12047).

F. Benefits Not Available Without Merger.

In footnote 40 on pages 54-56 of its brief, the Department makes a flank attack on the Milwaukee's conditions by intimating that the Commission could open the gateways under 49 U.S.C. 1(4), 3(4), 15(3) and 15(4).

The District Court observed that the Milwaukee's hopes

of obtaining relief are doubtful, at best, in view of the Commission's judicially approved interpretation of the law[12] and then said:

> "Assuming that the Commission attributes to the conditions strengthening Milwaukee benefits which arise from approval of the merger, the fact that some of those benefits might possibly otherwise have been obtained hardly detracts from the actual advantage of the present conditions, if, as we believe, they give support to the Commission's finding that the merger is consistent with the public interest." (App. 34).

Moreover, opening of the western gateways is only one of six conditions for the improvement of Milwaukee's competitive position. No suggestion is made by the Depart-

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[12] *Chicago, M.St.P. & P.R. Co.* v. *United States,* 366 U.S. 745. The Department suggests that the Milwaukee's unsuccessful attempt to force open a gateway with the applicants at Spokane in this litigation failed because on the record it was not shown that the adequate transportation exception to the restriction on the Commission's powers applied (Title 49, Sec. 15(4)(b)). The record in the proceedings before the Commission (*Chicago, M.St.P.& P.R.Co.* v. *Spokane, P.& S.Ry. Co.,* 300 I.C.C. 453) shows that the Milwaukee presented at great length all the evidence it could muster to urge that the exception in Sec. 15(4)(b) was applicable to override the statutory protection for a railroad's long haul, but the Commission found that the evidence was insufficient and that it was precluded by the 49 U.S.C. 15(4) restrictions from opening the gateways. Moreover, the Commission's defense of its interpretation of the law was effectively and successfully supported by the Department in the subsequent Court proceedings. The Milwaukee can perhaps be forgiven a lack of enthusiasm for the Department's suggestion that it again travel a dead-end road.

It is also important to note that the gateways condition provides for the immediate opening, upon merger, of numerous gateways and on all commodities whereas an effort to compel opening of a gateway without merger would involve, as in Milwaukee's unsuccessful *Spokane* case, proceedings and justifications not only as to each gateway but also as to each commodity individually.

ment that access to Portland, faster service to and from the Canadian border, or service to Billings could be secured by the Milwaukee other than by conditions to the proposed merger. All of the conditions are necessary for the maximum enhancement of Milwaukee's competitive ability.

CONCLUSION

For the foregoing reasons the judgment of the District Court should be affirmed.

Respectfully submitted,

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NOS. 28 AND 43

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NO. 28

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

NO. 43

CITY OF AUBURN,
Appellant,

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR GREAT NORTHERN RAILWAY COMPANY, ET AL.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 28

UNITED STATES OF AMERICA,
Appellant,

v.

UNITED STATES OF AMERICA AND
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

No. 43

CITY OF AUBURN,
Appellant,

v.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION, ET AL.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR GREAT NORTHERN RAILWAY COMPANY, ET AL.

These are two of four appeals from a judgment of a three-judge District Court in the District of Columbia that unanimously sustained orders of the Interstate Commerce Commission authorizing the following transactions:[1]

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[1] Each of the other two appeals—*Charles E. Brundage, et al.* v. *United States, et al.*, No. 38, and *Livingston Anti-Merger Committee* v. *Interstate Commerce Commission, et al.*, No. 44,—raises different issues. These appellees are filing a separate brief in each of those appeals.

(1) the merger of Great Northern Railway Company (Great Northern), Northern Pacific Railway Company (Northern Pacific), Chicago, Burlington & Quincy Railroad Company (Burlington), and Pacific Coast R.R. Co. (Pacific Coast) into the Great Northern Pacific & Burlington Lines, Inc. (New Company); (2) the lease by the New Company of the properties and assets of Spokane, Portland & Seattle Railway Company (SP&S); and (3) the issuance of securities, the assumption of obligations, and other steps incidental to the principal transactions.[2]

In approving the merger, subject to extensive conditions, the Commission found that it would benefit shippers, the public, the carriers involved, their employees, and certain competing carriers. The Commission recognized that the merger would eliminate competition that now exists between the Great Northern and the Northern Pacific (Northern Lines) in the northern tier of states.[3] It found, however, that after merger substantial competition would exist both from other railroads and from other modes of transportation. It prescribed conditions for the benefit of competing railroads and found that those conditions would enhance rail competition in the territory served by the Northern Lines. It also found that there would be no significant adverse effects on any railroad. Weighing these and other relevant considerations the Commission determined that the merger would achieve overriding benefits for the public through improved transportation and would be consistent with the public interest.

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[2] The railroads referred to above, on whose behalf this brief is filed, are sometimes collectively referred to herein as "the applicants."

[3] Minnesota, North Dakota, Montana and Washington (App. 316).

QUESTION PRESENTED

Whether the Commission's determination that the merger will be consistent with the public interest is in accord with the statutory standards and rests upon adequate findings that are supported by substantial evidence.

STATEMENT

I. THE MERGING RAILROADS, THEIR COMPETITORS, AND THE BACKGROUND OF THE MERGER

A. The Merging Railroads

Appendix A to this brief is a map that shows the principal lines of the merging railroads. The main lines of both Great Northern and Northern Pacific extend from Duluth and the Twin Cities across the northern tier of states to Spokane, Portland, Seattle and other terminals in the Pacific Northwest. Although the two railroads thus operate between the same terminals, in the intervening territory there are substantial differences in the extent and location of their operations (App. 566). The greater part of the mileage of the Great Northern is in the eastern portion of its system while the greater part of Northern Pacific's mileage is in its western portion (App. 253, 566). The southern part of Minnesota is served by Great Northern but not by the Northern Pacific. Of the two, only Great Northern has lines in South Dakota and Iowa. As the lines of the two railroads proceed west they are widely separated. In Montana and North Dakota the major portions of the main lines are separated by hundreds of miles (App. 770). Thus the Great Northern primarily serves the northern portion of the northern tier of states west of Minnesota, while the Northern Pacific primarily serves the southern portion (App. 253). Only Great Northern reaches California.

The operations of SP&S are confined to Washington and Oregon where it operates approximately 600 miles of road. Its main line extends from Spokane to Portland and forms part of the through routes of the Great Northern and Northern Pacific on traffic to and from northwest coast terminals. Pacific Coast, a wholly owned subsidiary of the Great Northern, operates approximately 32 miles of track in King County, Washington.[4]

The Burlington's eastern terminal is Chicago. From that point its principal lines extend to the Twin Cities and to St. Louis and Kansas City, Missouri, Omaha and Lincoln, Nebraska, Denver, Colorado, and Laurel and Billings, Montana.[5] Since the Burlington's lines link those of the Northern Lines with Chicago, St. Louis, Omaha, and other midwestern points, its operations are largely complementary to and not competitive with those of the Northern Lines (App. 254).

For many years the merging lines have had substantial common interests and interlocking relationships. Since 1901 Great Northern and Northern Pacific have owned in equal shares approximately 97 percent of the stock of Burlington and the presidents of Great Northern and Northern Pacific have both been directors of Burlington. Since 1905 the Northern Lines have jointly owned all of the stock of SP&S. Since 1903 they have also jointly owned all of the stock and managed the operation of Midland Railway Company of Manitoba.[6]

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[4] The lines of Pacific Coast are not shown in Appendix A.

[5] A subsidiary of the Burlington operates a line between Wendover, Wyoming, Denver, Colorado, and Galveston, Texas, which is not shown in Appendix A.

[6] Midland owns 14.5 miles of terminal tracks in Winnipeg and has trackage rights over the lines of Canadian National Railway from the international boundary at Pembina, North Dakota and from Emerson Junction, Manitoba to Winnipeg. Midland is not subject to regulation under the Interstate Commerce Act because its operations are confined entirely to Canada.

B. Rail and Intermodal Competitors in the Area Served by the Northern Lines

The territory served by the Northern Lines is also served by other railroads, whose principal lines are shown in Appendix A, and by other modes of transportation.[7]

The Chicago, Milwaukee, St. Paul and Pacific Railroad Company (Milwaukee) competes for traffic moving between the Pacific Northwest and midwestern or eastern points, and also for other traffic moving to, from or between the many points it serves in the northern tier of states and elsewhere. Main lines of the Milwaukee extend from Chicago and Duluth through the Twin Cities to points in the Pacific Northwest including Spokane, Seattle and Tacoma, ending at Longview Junction, Washington, 47 miles north of Portland, Oregon.[8] The Milwaukee has the shortest rail route between Chicago and Seattle. Over much of its transcontinental route the line of the Milwaukee closely parallels that of the Northern Pacific.

The competitive capacities of the Milwaukee have been restricted by certain routing limitations and by the fact that it has had no access to Portland (see pp. 65-67, 71-74, below). These and other historic disabilities will be removed upon merger of the Northern Lines by conditions that the Commission attached to its orders in the present case. Even with the disabilities the Milwaukee has been an active and substantial competitor of the Northern Lines and other railroads for traffic originating or terminating in the north-

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[7] The competitive situation in the area served by the Northern Lines is discussed in detail at pages 81-114 below.

[8] The Milwaukee also has main lines extending from Chicago to Sioux City, Omaha and Kansas City and other lines in Indiana, Illinois, Wisconsin, the Upper Peninsula of Michigan, Iowa and Minnesota.

ern tier of states. See for example, Tr. 8867, 8876, 8902, 8971, 9045, 9069, 9084, 9101, 9105, 9146, 9820, 10118, 10155, 10551, 11685, 12617, 13329, 13385.

Union Pacific Railroad Company (Union Pacific) is also a vigorous competitor for traffic moving between the Pacific Northwest and midwestern or eastern points. It has a direct line between Seattle, Tacoma, Portland and other points in the Pacific Northwest, and Council Bluffs, Iowa, with connections on to Chicago.[9] Its line between Spokane and Portland (not shown in Appendix A) is the shortest rail route between those cities, and the line of its subsidiary, Spokane International, northeast from Spokane connects with the Canadian Pacific Railway (Canadian Pacific) at Eastport, Idaho. The strong competitive interest of the Union Pacific in traffic to and from the Pacific Northwest is indicated by the fact that in the proceedings before the Commission the Union Pacific opposed the condition that would give Milwaukee entry into Portland, on the ground that it would divert substantial traffic from the Union Pacific's lines (App. 333, 469-470; see pp. 94-96, below).

The lines of Soo Line Railroad Company (Soo Line) from Chicago and Duluth closely parallel the lines of the Great Northern from the Twin Cities through Minnesota to the northwestern part of North Dakota and there connect with the line of Soo's parent company, Canadian Pacific, to provide competitive line haul service on transcontinental traffic to and from Spokane and the rest of the Pacific Northwest via a connection with the Union Pacific system at the international border. Another Canadian Pacific line connects with both Milwaukee and Northern Pacific at the border north of Seattle. The record shows that the Soo

[9] The Union Pacific also has a direct line from Butte, Montana, via Ogden, Utah, to Council Bluffs, Iowa.

Line and its connections provide vigorous competition (Tr. 10221, 10224, 10263-64, 10272-73; see pp. 96-98, below).

The Western Pacific Railroad Company (Western Pacific), connecting with Great Northern at Bieber in northern California, operates over the central corridor route to its Utah gateway with connecting roads. It competes for traffic between the Pacific Northwest and midwestern and eastern points, both via that route and via its route connecting with the Santa Fe for hauls to Chicago. Western Pacific's route "is extensively used on both west of transcontinental and transcontinental traffic" (App. 823; see p. 96, below).

The Southern Pacific Company (Southern Pacific) directly serves Portland and connects there with carriers serving points in Washington. It competes by its central corridor Ogden route (with connections east of Ogden) and also by its southern corridor route for traffic between the Pacific Northwest and the midwestern, eastern and southern parts of the country (see p. 96, below).

In addition to the rail competition for traffic between the Pacific Northwest and the Midwest, East and South, there is also competition for traffic within the area served by the Northern Lines and between points in that area and terminals in the Midwest or the Pacific Northwest. In the western portion of the northern tier of states rail competition is provided by both the Union Pacific and the Milwaukee, and in the eastern part of the northern tier rail competition is provided not only by the Soo Line and the Milwaukee but also by the Chicago and North Western Railway Company (North Western) whose lines extend from Chicago to the Twin Cities and Duluth-Superior, to Omaha and to various points in Minnesota, North and South Dakota, Wyoming, Michigan, Wisconsin, Iowa, Nebraska and Illinois. The

competitive capacity of both the North Western and the Soo Line, as well as that of the Milwaukee, will be increased by conditions which the Commission has attached to its orders (see pp. 77-79, 80-81, below).

Rail competition will continue after the merger with respect to almost all of the traffic that is now competitive between the merging roads. In the entire northern tier there are only 47 communities, most of them very small, which are served only by the Northern Lines and by no other rail carrier (App. 316) and each of these communities except Reformatory, Minnesota, is served by one or more motor carriers (App. 779).[10]

There is vigorous and extensive intermodal competition throughout the northern tier of states and the other areas served by the applicants (App. 298, 310, 318, 319, 571-572, 777-784). There are 248 Class I motor carriers that serve points on the lines of applicant railroads. Truck lines serve all of the important points and areas that are served by the two Northern Lines. These lines include a truck carrier (Consolidated Freightways) that operates a coast-to-coast system which blankets the lines of applicant railroads and serves all of the major terminals of the Northern Lines except for Head-of-the-Lakes (Duluth-Superior) (Ex. 17, p. 28). Another truck carrier (Pacific Intermountain Express) which in the past has operated on routes between points in the Pacific Northwest (Seattle, Tacoma, Portland, Spokane) and the Twin Cities and Chicago, has recently been authorized through merger to provide a "single-line, coast-to-coast, transcontinental service" to "replace the joint-line service heretofore provided." *Pacific Inter-*

[10] Less than 6% of all the tons originated or terminated by the Northern Lines in the northern tier of states comes from or is received at localities now served by two or more of the applicants and by no other railroad (see pp. 82-84, below).

mountain Express Co.—Control and Merger—All States Freight, Inc., 101 M.C.C. 137, 146 (1966). In addition to the common carrier truck lines there are numerous contract carriers and private and exempt motor carriers that operate in the northern tier of states and elsewhere in applicants' area.

Since 1947 the operating revenues of the 248 Class I motor carriers that serve points on the lines of applicants have increased by $1.5 billion, and their ton miles by 23 billion.[11] The growth of truck competition in the territories served by the Northern Lines is also indicated by the growth in the tons of revenue freight carried in intercity freight service by Class I and Class II motor carriers in the Northwestern Region, which increased from less than 2,000,000 tons in 1940 to more than 16,000,000 tons in 1958 and in the Rocky Mountain Region from less than one-half million tons in 1940 to over 13,000,000 tons in 1958.[12]

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[11] These figures were derived by comparing operating revenues and ton miles in 1947 for each of the motor carriers with the similar figures for the carrier in the latest year for which data was available prior to the hearings. The subsequent growth of the motor carriers is indicated by the fact that the annual carrier revenues of Consolidated Freightways, which were stated in the evidence as $72 million (Ex. 17, p. 23), increased to $255 million in 1968 (Annual Report to stockholders for 1968).

[12] The rapid increase of the Class I and Class II motor carrier tonnage has continued; in 1965 those carriers handled approximately 30,000,000 tons in the Northwestern Region and 17,000,000 tons in the Rocky Mountain Region (*Seventy-Ninth Annual Report of Transport Statistics in the United States for Year Ended December 31, 1965—Part 7—Motor Carriers* (1968), pp. 49, 51, 171, 173). For regulatory purposes Minnesota, North Dakota, South Dakota, Wisconsin and a portion of the Upper Peninsula of Michigan are designated as the Northwestern Region, and Montana, Idaho, Colorado and Wyoming as the Rocky Mountain Region.

Furthermore, the private and exempt motor carriers handle almost twice as much traffic as do the motor common carriers (App. 779-780).

The competition of the truck carriers is not confined to short hauls. In 1959 the average length of haul of the 29 regulated motor carriers had increased to 402 miles as compared with an average haul for the Great Northern of 381 miles and for the Northern Pacific of 462 miles (App. 35-36, 202). Their competition is not confined to manufactured products but extends to agricultural products, livestock, lumber and paper products, iron and steel and to bulk products such as grain, steel, cement, salt and lime, which are sometimes assumed to be not particularly susceptible to truck competition.[13]

The construction of more and improved highways in the area served by the applicants which is now either under way or planned foreshadows increased competition from regulated and from private and contract motor carriers. One of the most significant developments in this respect is the partially completed construction of the new Interstate Highway No. 90-94 between Chicago and the Twin Cities and Seattle, which between the latter points will be 240 miles shorter than the route of Great Northern, and which will permit trucks to reduce travel time between the Twin Cities and Seattle from 60 to 36 hours (App. 310).

The applicants also face additional and increasing competition from inland waterway transportation (App. 298, 310, 781). In recent years the tonnage handled by water

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[13] There was extensive evidence with respect to the development of motor carrier competition in these commodities including, for example, the trucking of grain from Montana for the more than 1,000 mile haul to West Coast terminals (see pp. 102-111, below).

carriers has increased even more rapidly in the territory served by the Northern Lines than it has in the nation as a whole. Between 1947 and 1959 the total tons passing the Bonneville Dam in the Columbia River increased by 77 percent, whereas in the nation as a whole the total ton miles on inland waterways in the same period increased by only 34 percent. The tonnage of grain, petroleum products, and other commodities on the Columbia River was more than 2,000,000 tons in 1959 (Ex. 17, p. 37). The tonnage of grain alone had grown from 90,000 tons in 1947 to 740,000 tons in 1959 (the equivalent of 13,900 carloads) (*ibid.*; Tr. 528).

Establishment of ports on the Columbia and Snake Rivers coupled with truck transportation to or from those ports has had a direct competitive effect upon rates and has resulted in downward adjustments in rail rates from Montana, Northern Idaho, Washington and Oregon to the North Pacific Coast and California points. *Grain from Idaho, Oregon and Washington to Ports in Oregon and Washington,* 326 I.C.C. 358 (1966). Despite the reductions in rail rates, the tonnage of grain handled by barges on the Columbia River increased by almost 60 percent between 1959 and 1963, being 1,171,191 tons in the latter year (*id.* at 367). This competition will increase in the future because programs are now under way to improve the waterways and to extend barge navigation up the Snake River from the Columbia River to a point above Lewiston, Idaho, and up the Missouri River beyond the Sioux City port (App. 781).

The amount of freight moving on inland waterways in other parts of the territories served by the applicant railroads, as for example on the Mississippi from Minneapolis to the mouth of the Missouri north of St. Louis, on the Illinois waterways and on the Missouri River itself, has

substantially increased.[14] The combination of water and truck transportation in these and other areas has had a substantial competitive effect upon the operations of the applicant railroads.[15]

C. The Background of the Merger

For many years the two Northern Lines have had the common interests and relationships which have been referred to at page 4 above. Their operations to a great extent involve duplicate services and duplicate facilities which are not used to full capacity (App. 770). These circumstances long ago led the managements of the two roads to believe that the combination of the carriers, and their subsidiaries and affiliated companies, could achieve economies and efficiencies that would produce better and more efficient transportation service. Prior to 1920 the preservation of competition among railroads was regarded as a paramount national policy (*St. Joe Paper Co.* v. *Atlantic Coast Line R. Co.*, 347 U.S. 298, 315) and any proposal for the merger of rail carriers was fully subject to the application of the antitrust laws. That situation changed with the passage of the Transportation Act of

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[14] For example, the tonnage of barged grain on the Mississippi from Minneapolis to the mouth of the Missouri, a movement that is directly competitive with rail movement by the Burlington, has increased from 118,000 tons in 1947 to 4,135,000 tons in 1959 (Ex. 1[illegible] p. 34) and to 10,200,774 tons in 1964 (*Waterborne Commerce of the United States, Part 2—Calendar Year 1964*, p. 195).

[15] The competition of pipelines has also increased more rapidly in the area served by applicant railroads than it has in the nation as a whole (App. 781). Throughout the territory served by applicant railroads the scheduled airlines dominate the long haul passenger field and in addition they and specialized freight airlines are competing with increasing success for high revenue freight (*ibid.*).

1920 when for the first time "consolidation of the railroads of the country, in the interests of economy and efficiency, became an established national policy." *United States* v. *Lowden,* 308 U.S. 225, 232.

Acting pursuant to the provisions of the 1920 Act, the Northern Lines in 1927 filed an application with the Interstate Commerce Commission seeking approval for a transaction whereby a new company would acquire control and undertake the operation of the Northern Lines, the SP&S and the Burlington. After extensive hearings the Commission in 1930 decided that the unification of the Great Northern and Northern Pacific and the SP&S would be in the public interest. In reaching this decision the Commission reviewed the extent of the competition between the Northern Lines and the transportation benefits that would follow from the unification and concluded that on balance the substantial advantages in terms of economy and efficiency of operations and improvement in service justified approval of the unification. *Great Northern Pacific Railway Company Acquisition,* 162 I.C.C. 37 (1930). The Commission, however, conditioned its approval on exclusion of the Burlington from the transaction (*id.* at 69). Since exclusion of the Burlington was not acceptable to the Northern Lines they did not pursue the proposal.[16]

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[16] The Commission's requirement that the Burlington be excluded from the proposed transaction reflected action taken earlier by the Commission in a broader context. Under the Transportation Act of 1920 the Commission was required to devise and promulgate a Master Plan for the establishment of a limited number of railroad systems in the United States. The Act further provided that voluntary merger proposals submitted by carriers should comply with the Master Plan. In 1929 the Commission promulgated such a plan. *Consolidation of Railroads,* 159 I.C.C. 522. Under that plan the Great Northern, the Northern Pacific and SP&S and certain short line railroads were combined in a single system while the Burling-

The considerations that led the Commission to determine in 1930 that the unification of Great Northern, Northern Pacific and SP&S would serve the public interest have not disappeared with the passage of time. On the contrary, changes in the transportation industry and in the condition of the applicants have strengthened those considerations. In the area served by the applicant railroads there has been a progressive growth of competition offered by motor carriers and other modes of transportation, and railroad freight traffic has decreased in relation to the total transportation market (App. 298). These developments, as we shall show at pages 51-55 below, have impaired the earning power of the applicants and reduced their rates of return to levels that are below the national average for Class I railroads and tend to discourage capital investment in transportation facilities.

By 1955 the portent of these conditions was sufficiently grave to cause the managements of the applicants to determine that consideration should again be given to a merger. In that year conversations began between executives of the applicants with respect to the possibility of

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ton and certain other railroads in the Midwest and Southwest were placed in a different system (*id.* at 538, 540).

The requirement of the Transportation Act of 1920 that the Commission prepare a Master Plan and that all carrier unification plans conform to its provisions proved to be impractical as a means of achieving the Congressional purpose of consolidating the railroads of the country into a number of unified and efficient systems. See Leonard, *Railroad Consolidation under the Transportation Act of 1920* (1946), p. 256. Accordingly, in 1940 Congress repealed those provisions of the 1920 statute and substituted the present provisions of Section 5(2) of the Interstate Commerce Act which in substance permit carriers voluntarily to propose merger plans to the Commission and direct the Commission to approve any plan that it finds to be "consistent with the public interest" (Section 5(2)).

such a merger. A joint committee of five directors from each of the two Northern Lines, together with the president of the Burlington, was formed early in 1956 to consider merger and an engineering consulting firm was employed to supervise and direct an economic study of possible unification. Each of the Northern Lines retained an independent financial adviser to assist it in determining what merger terms would be fair and equitable to the stockholders of both companies. As a result of these activities the applicants agreed to a merger plan which they proceeded to submit to the Commission for approval pursuant to the provisions of Section 5(2) of the Act (App. 646-650).

II. THE PROCEEDINGS BEFORE THE COMMISSION

A. The Initial Hearings and the Examiner's Recommended Report

The applications for approval of the merger were filed in February 1961. Hearings before an Examiner were held on 82 days between October 1961 and July 1962 at 16 cities and towns throughout the applicants' territory. Testimony was given by 623 witnesses and the transcript included more than 15,000 pages of testimony and approximately 240 exhibits.

Intervention petitions were granted on behalf of more than 400 parties. These parties included individual shippers and shipper and producer associations, civic groups, municipalities and port districts, states or state agencies, representatives of railway labor, ten railroads, the Department of Justice and the Secretary of Agriculture.

One striking aspect of the hearings was the widespread and vigorous support for the merger offered by the shipping public. Of the intervening parties 292 were individuals or corporations who were shippers of freight or who were

otherwise directly interested in transportation service. Almost without exception these parties supported the merger as being in the public interest, or indicated that they would support it if conditions were attached for the protection of other carriers. Thirty-five shipper and producer associations, 50 chambers of commerce and other civic groups, and 9 municipalities and port districts supported the merger. Three hundred and seven shipper and public witnesses testified on behalf of the applicants in support of the merger and numerous witnesses called by various intervening parties likewise favored the merger (App. 85).

Of the more than 400 intervening parties only 30 were opposed to the merger, with or without conditions. These opponents included the Department of Justice, the City of Auburn, the states of Minnesota, Montana and Washington and the Public Utility Commissioner of Oregon. The Railway Labor Executives' Association (RLEA) at that time opposed the merger, primarily on the ground that it would have an adverse effect on the employees involved.

None of the ten intervening railroads opposed the merger as such, although a number, notably the Milwaukee and the North Western, proposed the imposition of conditions that would protect or increase their traffic and revenues. The applicants opposed the conditions proposed by the Milwaukee and the North Western and those roads introduced a substantial amount of evidence in support of the requested conditions.[17]

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[17] A number of parties who opposed the merger as proposed or whose support was qualified took the position that they would favor the transaction if it were conditioned as proposed by the North Western and the Milwaukee. Among the parties who took this position were the states of Iowa, North Dakota, Michigan, Wisconsin and South Dakota (App. 93). The states of Nebraska and Missouri were parties in support of the merger from the outset.

On August 24, 1964 the Examiner issued a recommended report consisting of 456 mimeographed pages, plus volumi nous appendices (App. 507-1257). After reviewing the evidence in detail the Examiner concluded that the merger would be in the public interest and recommended approval subject to certain conditions.[18]

B. The Commission's First Report

In its First Report, issued on March 31, 1966, the Commission by a majority of one (six to five) denied the applications. The majority of the Commission concluded that the merger would suppress substantial competition between the Northern Pacific and Great Northern in the northern tier of states; that unless the merger were conditioned as requested by the Milwaukee and North Western, approval would not be in the public interest and that if it were so conditioned the benefits to the applicants would be "minimal" and might preclude consummation; that the merger would have substantial adverse effects upon the applicants' employees; that the shipper and other public support was counterbalanced by the views of state and federal agencies; and that although the merger would produce transportation benefits that could not be achieved in its absence those benefits were outweighed by the lessening of competition and the adverse effects on carrier employees.

The dissenting commissioners criticized the majority report at length and in detail. They pointed out, among other things, that the majority had disregarded, or failed to give due weight to, the evidence by exaggerating the extent and the economic significance of the competition between the Great Northern and Northern Pacific that would be elimi-

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[18] The Commission made the Examiner's Recommended Report a part of its order approving the merger (App. 457, 496).

nated by the merger (App. 175-176, 189-191); by declining to give appropriate weight to the shipper and public support for the merger (App. 167, 174, 180, 207-208); by minimizing the effects of intermodal competition (App. 176-177, 197-198, 201-207); by refusing to recognize the increasing financial problems of the applicants (App. 198, 199, 200); by minimizing the transportation benefits that the merger would achieve (App. 170); and by refusing to recognize that the imposition of the conditions sought by the Milwaukee, the North Western and other roads would significantly enhance and strengthen both interrailroad competition and rail competition with other modes of transportation in the territory served by the applicants (App. 175, 177, 180-184, 210-211). The dissenting commissioners also took the position that the majority had misread and misapplied the statutory standard because they had failed to recognize that under Section 5(2) of the Interstate Commerce Act the preservation of competition is not in itself a controlling end, as it is under the antitrust laws, but is only one factor among others to be considered in determining whether the probable consequences of a proposed transaction will in their total effect promote improved transportation systems (App. 168-170, 199, 211).

C. The Petition for Reconsideration and the Further Hearings

On July 27, 1966, the applicants petitioned the Commission for reconsideration of its First Report. In their petition the applicants stated that they were willing to accept the conditions that had been proposed by the Milwaukee and North Western[19] and that they were also willing to

[19] In October 1966 agreements were made between the applicants and the Milwaukee and the North Western reducing to specific terms the conditions previously proposed by those roads which applicants had offered to accept (Exs. 250, 251). There was no agree-

accept conditions requiring the New Company to make attrition agreements for the protection of their employees.[20] The petition alleged that in fact the probable savings to be achieved by the merger would substantially exceed the amount of savings found in the Commission's First Report even after allowances were made for the New Company's loss of earnings on traffic that would shift to the Milwaukee and the North Western if their conditions were imposed and for the cost of the attrition conditions for employees. The petition also pointed out that in important respects the First Report of the Commission had erred in its appraisal of the evidence, particularly as it related to the effect of the merger on competition and to the transportation benefits that would follow from the merger.

In pleadings filed in response to the petition for reconsideration numerous shipper, agricultural, livestock and horticultural interests in the Northwest urged approval of the merger. Approval was advocated or objections withdrawn by a number of parties who had previously opposed the merger or who had opposed it unless conditions were imposed for the benefit of other railroads. These parties included the United States Department of Agriculture, the

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ment that the Northern Lines "would seek only standard protective conditions" in the Milwaukee-North Western merger proceeding (D.J.Br. 12). In fact the two Northern Lines sought extensive conditions that went beyond the standard protective conditions (Recommended Report, pp. 216-221, I.C.C. Finance Docket Nos. 24182, *et al.*).

[20] The petition recited that the applicants had made attrition agreements with the labor organizations representing certain of their employees which gave the employees guarantees and job assurances for the rest of their working lives and that applicants would be willing to make similar arrangements with other labor organizations and with individual employees who were not represented by a union.

Public Utility Commissioner of Oregon and the states of North Dakota, South Dakota, Iowa, Wisconsin and Michigan. The Milwaukee and the North Western also advocated approval. The states, public bodies and shipping interests that had favored the merger from the outset renewed their support (App. 268).

On January 4, 1967, the Commission reopened the proceeding "for reconsideration, for oral argument, and for further hearing; the further hearing to be limited solely to determining, on the basis of the most current information readily available, the amount of the estimated savings resulting from the proposed merger in the light of (1) agreements entered into between the applicants, on the one hand, and, on the other, the Milwaukee and the North Western and (2) the effect of relevant financial, operational and other changes related to savings, which have occurred subsequent to the close of hearings; . . ." (App. 251). Pursuant to the Commission's order further hearings were held before an examiner in March and May 1967. After the conclusion of the hearings there were briefs and oral argument to the Commission that covered all issues.

D. The Commission's Reports and Orders on Reconsideration

In its Report on Reconsideration and Further Hearing (Second Report), which was dated November 30, 1967, the Commission, by a vote of eight to two, approved the merger subject to 34 extensive conditions (App. 245-462).[21] It stated

[21] The majority of 8 was composed of 3 commissioners who had previously voted to approve the merger, 3 commissioners who had been with the majority in the First Report but who voted on reconsideration to approve the merger subject to conditions, and 2 commissioners who had been appointed subsequent to the First Report. One commissioner who had been recently appointed did not vote. The two dissenting commissioners had voted with the majority in the First Report.

that "we are convinced on deliberate and searching reconsideration that the proposed unification, subject to appropriate conditions, which we shall specify to protect competing railroads, employees and the general public, will be consistent with the public interest and should be approved" (App. 273). The prescribed conditions will, among other things, give the Milwaukee entry into Portland for the first time and open to it 11 gateways in North Dakota, Montana and Washington presently closed to it by routing restrictions.[22]

In its Second Report the Commission stated that its purpose in reopening the proceeding for reconsideration was "to reexamine each and every issue of substance and to weigh carefully every potential advantage and disadvantage that may reasonably be expected to result from the proposed unification" (App. 273). The findings and conclusions of the Second Report show that in fact the Commission fully complied with this avowed purpose.[23]

The Commission discussed the relevant statutory criteria (App. 273-278). It explicitly recognized its obligation to achieve an accommodation between the National Transportation Policy and the policy of the antitrust laws (App. 278) and to consider the adverse effects of a proposed transaction upon competition as an important factor in determining whether the transaction will aid in attaining the objectives of the National Transportation Policy (App. 278,

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[22] Conditions for the benefit of the Milwaukee and other roads, and their significance, are discussed below at pages 63-81.

[23] The Department's statement (D.J.Br. 6, n.2) that the "primary findings of fact in the Commission's First Report" were "not amended or challenged" in the Second Report is subject to substantial qualifications. The Commission in its Second Report rejected or revised in significant respects a number of the findings in the First Report. See for example, pp. 22-26, below.

313). It also recognized that although Section 5(2) of the Interstate Commerce Act was intended to facilitate rail mergers that would promote the National Transportation Policy there was no presumption in favor of any particular merger proposal but that "the public interest scale is at balance, weighted neither for nor against merger in a particular case. Solely by the evidence bearing upon public interest can the balance be tipped" (App. 276).

The Commission reviewed the evidence, including particularly the evidence introduced in the further hearings, bearing upon the savings that could be achieved by the merger as conditioned (App. 257-266, 299-302). It found that the updated estimate of savings in the amount of $39,673,000 is "a reasonably accurate portrayal of the savings attributable to the proposed unification" (App. 301). In this respect the Second Report substantially revised the findings of the majority of the Commission in the First Report. There the Commission had found the savings might amount to "between $12.7 million and $25.5 million" (App. 165).[24]

The Commission also reviewed and reconsidered the evidence relating to the financial condition of the applicants. Although the Commission stated that each of the applicants "is currently in a relatively healthy financial condition" (App. 279) it also found that "applicants are faced with growing intermodal competition" and "an inability to prevent traffic erosion" (App. 298). The Commission noted the severe and steady decline in the applicants' pre-tax earn-

[24] The First Report left the derivation of the $12.7 million figure in obscurity. The majority found that the proposed merger, conditioned for the benefit of the North Western and the Milwaukee, might "result in annual savings in the amount of $25,487,415 . . ." (App. 164). Thereafter the report introduced the $12.7 million figure without explanation (App. 165).

ings from their railroad operations over the 15 year period 1951-1965 (App. 298-299), a fact that had been ignored by the majority of the Commission in the First Report. The Commission also adverted to the applicants' abnormally low rate of return (which had been ignored in the First Report) pointing out that it was "less than the yield on nonrisk Government bonds" and was below the low average rate of return for all Class I railroads (App. 299). The Commission found that low rates of return if continued "may well pose serious obstacles in attracting necessary investment capital, and affect reinvestment decisions by the rails as well" (App. 299; see also App. 304-305).

The Commission made new findings on the benefits of the merger to the shippers, to the public and to the carriers (App. 302, 305-311). The Commission found that the merger, by improving the financial position of the applicants, would make them stronger and more stable and thus better able to meet increasing intermodal competition, and that the consolidation of facilities, the elimination of wasteful duplication, improved routing, better car fleet utilization and avoidance of time consuming interchanges among applicants would result in a more efficient railroad and better service (App. 302). The Commission also made specific findings relating to the benefits that shippers would receive from faster and more dependable freight schedules and services (App. 305-308); from additional routes, with attendant unloading and consignment privileges, that would enable shippers to reach new markets and sources of supply (App. 308); and from the reduction in rates resulting from the availability of single-line rather than the higher two-line rates (App. 309-310). The Commission found that the applicants' ability to operate more efficiently at lower cost should have beneficial effects on the rates and service afforded shippers and receivers (App. 305-306). The Com-

mission also made findings with respect to the benefits that would accrue to shippers served by the Milwaukee, the North Western and other railroads, as a result of the conditions prescribed for the benefit of those railroads (App. 308, 310-311).[25]

The Commission considered the change in circumstances created by the attrition agreements made by applicants for the benefit of certain of their employees and by applicants' announced willingness to make similar agreements with other employees (App. 323-328). The Commission reviewed the agreements, found that they would adequately and fairly protect the interests of the carrier employees (App. 326) and imposed as a condition that the attrition provisions of the agreements be extended to all affected employees who had not entered into such agreements (App. 327). The effect of these conditions was to extend, upon merger, lifetime job and monetary guarantees to the employees of the applicants. The Commission found that the prescribed conditions alleviated the hardship on employees, which had been an important factor relied upon by the majority of the Commission in its First Report (App. 328), and that these employee benefits "could hardly have been achieved except for the merger" (App. 326).

The Commission carefully analyzed and considered the effects of the merger on competition (App. 310-311, 312, 315-321, 329-331). Although the Commission's findings on this aspect of the case are discussed in detail at pages 81-114 below, certain aspects of those findings should be mentioned here. The Commission did not, as the Department of Justice suggests (D.J.Br. 12-13), direct its

[25] The Commission also found that the merger would provide the New Company with an increased capacity to serve the national defense (App. 311).

analysis solely to the entire system of applicants but specifically considered the competitive situation in the four-state northern tier.[26] Thus, the Commission directed its analysis to the same traffic statistics relating to the common points served by the Northern Lines in the northern tier that were used by the majority of the Commission in the First Report (compare App. 316 with App. 141-143). The Commission's analysis, however, was more precise and realistic than the analysis in the First Report; it recognized, as the record required it to do, that for a number of reasons competition between the Northern Lines at many of the common points was more theoretical than real (see pp. 83-85, 87-92, below).

Furthermore, the Commission in its findings took into account the fact, which was ignored in the First Report, that at the important common points in the northern tier rail competition would continue after the merger and that the Milwaukee which serves every major common point served by the Northern Lines would be substantially strengthened by reason of the conditions imposed for its benefit.[27] The Commission also recognized that after the merger intermodal competition would exist at those common points—a relevant circumstance that was minimized if not ignored in the First Report. In short, the Commission did not assume, as the majority did in the First Report, that a single controlling consideration was what competition between the Northern Lines would be lost by the merger but

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[26] The Commission also gave consideration to the traffic at common points and other points served by the applicants systemwide but so did the majority of the Commission in its First Report (App. 141).

[27] The Commission further found that none of the rail competitors would be significantly injured (App. 328, 333-334, 338).

also gave due regard to what competition—rail and intermodal—would remain.

The Commission also gave weight to the evidence of the many shipper witnesses from within the northern tier who supported the merger despite the fact that they were aware that it would eliminate or reduce some competition (App. 320). The Commission recognized that the significance of this testimony lay in the fact that it was given by persons who would actually use the transportation services involved and who were therefore in a position to form a considered and empirical judgment on whether the benefits of the merger would outweigh the loss of competition. The Commission pointed out, among other things, that the attempt of the majority in the First Report to use the testimony of shipper witnesses to support its conclusions ignored the fact that the witnesses cited by the majority favored the merger subject to appropriate conditions for the Milwaukee (App. 320). The Commission also noted that various shippers and state and federal agencies that had initially opposed the merger had either explicitly withdrawn that opposition or changed to a position of support for the merger.

Having thus analyzed and considered both the benefits that would result from the conditioned merger and the extent and significance of the loss of competition between the two Northern Lines in the northern tier, the Commission determined that the loss of that competition did not require denial of the application (App. 320) but that the merger, appropriately conditioned, would provide "overriding benefits to the public through improved transportation" and should be approved (App. 344).

Petitions for reconsideration of the Commission's decision were filed by a number of parties and in response to

those petitions the Commission issued another report on reconsideration dated April 11, 1968 (App. 463-495).[28] In that report the Commission modified in certain respects the conditions attached to the Second Order but otherwise reaffirmed its previous determination.

The most significant change that the Commission made by its order of April 11, 1968, related to the Milwaukee. As first prescribed one of the conditions applying to the Milwaukee would have restricted its rate-making and service competition via its northern route as against central corridor routes operated by Western Pacific and Union Pacific, and their connections to Chicago and beyond (App. 480-486). The Milwaukee sought to have this provision of the conditions modified and the Western Pacific and the Union Pacific objected.[29] The Commission rejected the objections and modified the conditions in accordance with the Milwaukee's request thus increasing its competitive power as against the rail carriers operating over the central corridor routes.

After considering certain criticisms of the findings in its Second Report the Commission said (App. 475-476):

> "Satisfied that, by the imposition of appropriate conditions, the competitive ability of Milwaukee and North Western will be strengthened and that, by the attrition agreements, adverse effects on railway labor will be ameliorated, we remain convinced that these and other public interest factors of record were and are adequate to warrant our conclusion in the reconsideration report that the merger would now be consistent with the public interest."

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[28] The Department of Justice did not file a petition but responded to and in certain respects supported petitions filed by other parties.

[29] This controversy illustrates the vigor of the competition that exists for transcontinental traffic from and to the Pacific Northwest between the rail routes across the northern tier of states and the central corridor routes.

In a further report dated June 17, 1968, the Commission reviewed certain proposed tariffs filed in anticipation of merger and clarified the condition requiring the applicants to open 11 gateways to the Milwaukee by making clear that it extended to grain traffic (App. 498-503). The Commission emphasized its intention to construe and enforce the conditions in a manner that increases competition and benefits the Milwaukee (App. 501-503).

III. THE PROCEEDING BELOW

On May 9, 1968, the Department of Justice brought suit in the United States District Court for the District of Columbia to set aside the Commission's orders. In accordance with the provisions of 28 U.S.C. Secs. 2325, 2284, a three-judge court was convened which was composed of Chief Circuit Judge Bazelon, Senior Circuit Judge Fahy and Chief District Judge Curran. Various parties, including the applicants, intervened in the proceedings and a motion of the Department of Justice for preliminary injunctive relief resulted in a stay of the Commission's orders.[30] The District Court heard oral argument on the merits on July 9, 1968, and on November 20, 1968, unanimously rejected the contentions of the Justice Department and the intervening plaintiffs, sustained the Commission's orders and dismissed the complaints. The District Court summarized the grounds of its decision by stating: "We conclude that in

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[30] Appellant City of Auburn intervened as a plaintiff. The other intervening plaintiffs were the Northern Pacific Stockholders' Protective Committee; the State of Washington; the Board of Railroad Commissioners of Montana; the Minnesota Public Service Commission (which, after intervening, did not thereafter participate); and the Livingston Anti-Merger Committee.

The applicant railroads; the Milwaukee; 230 Pacific Northwest shippers; and the Public Utility Commissioner of Oregon intervened as defendants in support of the Commission's orders.

giving its approval the Commission was guided by the applicable legal principles and made findings, supported by substantial evidence, requisite to the validity of its action" (App. 5). The District Court gave particular attention to the findings and evidence on competition and held (App. 37-38):

> "We conclude the above consideration of the bearing of the problem of competition on the public interest equation of the merger by stating that the significant findings and conclusion of the Commission in this matter, to the effect that the competitive situation which will result from the merger is consistent with the public interest, are supported by substantial evidence considering the record as a whole, are reasonable and are sustained."

SUMMARY OF ARGUMENT

I

The Commission correctly understood and applied the public interest standard of Section 5(2). In accordance with the decisions of this Court it read that standard as relating directly to the provision and improvement of efficient and economical transportation facilities and services. *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 25. The Commission expressly recognized that a particular merger proposal enjoys no favorable statutory presumption but must be justified solely by evidence that it will be consistent with the public interest. The Commission gave weight to the matters specified in Section 5(2)(c) and to the National Transportation Policy. The Commission also recognized that the effects of a proposed merger on competition are an important consideration in determining whether the transaction will comply with the statutory standard. The Commission carefully considered the adverse effects of this merger on competition and weighed

these effects against the benefits of the merger. Thus it strictly complied with the teaching of this Court in *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88, and other decisions.

II

The Commission's determination that the public benefits of the merger will outweigh its limited anticompetitive effects rests upon reasoned findings that are supported by substantial evidence.

A. The Commission found that the merger, as conditioned in the order of approval, would bring "overriding benefits to the public through improved transportation." There is abundant evidence that the merged company by combining facilities and using shorter and more advantageous routes will provide faster, more dependable and more economical service to shippers than can be furnished by the applicants individually. Faster schedules and centralized control and distribution of all freight equipment will make it possible for the merged company to supply cars throughout its system at the times and places required to meet the needs of shippers, thus alleviating a chronic problem for shippers and producers in the Northwest. Consolidation will also give shippers important transit and routing privileges that they do not now enjoy and make available lower single-line rates in lieu of higher combination rates now applicable. For these and other reasons, the Commission found that the merger would provide, overall, an expedited and more satisfactory service to the public. These improvements cannot be achieved without merger because they require joint investment, operational coordination and the surrender of competitive advantages which the applicants as independent competitors have not found feasible and which would not be practical or consistent with

independent competitive operations. The employees of the merging carriers will be substantially benefited by receiving guarantees and job assurances for the rest of their working lives.

The merger by strengthening the financial position of the applicants will enhance their capacity to provide efficient, economical and improved transportation service and to meet intermodal competition. In the past 15 years there has been a severe downtrend in the applicants' net railway operating income before federal income taxes. Their rate of return on investment has declined to the point where it is below the average rate of all Class I railroads. The Commission correctly found that this decline in applicants' rate of return if continued will impair their ability to attract necessary investment capital and adversely affect reinvestment decisions.

The Commission found that the merger will result in savings of approximately $40 million annually. The evidence shows that this is a conservative estimate of the savings that will follow from the merger. These savings, as the Commission found, cannot be accomplished absent the merger. The savings will arrest the downtrend in applicants' pre-tax net railway operating income, improve their rate of return, and provide them with resources that will make possible new facilities and other transportation improvements and reduce the pressure for rate increases.

B. The Commission imposed conditions on the merger that will increase the competitive power of the Milwaukee and other railroads. These conditions will benefit both the railroads affected and the shippers they serve. The Milwaukee conditions will open 11 gateways in the northern tier to that road and create new rail competition in wide areas and for a vast volume of traffic. Many shippers will, for the first time, have a choice of railroads. The conditions

will give the Milwaukee access to Portland, which it has not previously had, and will enable it to compete effectively for transcontinental traffic and for north-south traffic in the Pacific Northwest. The conditions will also increase the competitive capacity of the North Western and the Soo Line.

C. The Commission properly found that weighed against the transportation benefits of the merger, the elimination of such competition as exists between Great Northern and Northern Pacific is not so significant as to warrant disapproval of the transaction. The Commission did not rest this determination merely on an analysis of the competitive situation throughout the applicants' entire system but gave particular and careful attention to the situation in the northern tier.

After the merger substantial rail and intermodal competition will exist throughout the northern tier. Competition by the Union Pacific, the Milwaukee, the North Western, the Soo Line, the Southern Pacific and other roads will continue for substantially all of the traffic in the northern tier that is now subject to rail competition. All the major terminals in the northern tier will be served by at least three railroads and by numerous motor carriers.

The communities in which the merger will wholly eliminate rail competition in the northern tier account for only 6 percent of applicants' revenues in that area. At stations accounting for the remaining 94 percent of applicants' revenues within the northern tier competition will either be completely unaffected by the merger or competition from other railroads will continue. The Department selects from this latter figure the 37 percent of revenues derived from traffic at stations served by both Northern Lines and one or more competing railroads, and combines this 37 per-

cent with the 6 percent referred to above to argue that the merger will eliminate competition between the two Northern Lines on traffic accounting for 43 percent of their northern tier revenues. The Commission correctly found that this figure overstates the amount of traffic on which competition actually exists between the two Northern Lines.

The figure includes revenue from stations on the branch line of one of the Northern Lines and on the main line of the other where competition between the two lines is extremely limited. It also includes traffic at stations served by both Northern Lines which is not competitive between them because its origin or destination is one of the hundreds of stations served by only one of the two lines. Thus 89.44 percent of all of applicants' revenues from traffic on agricultural products originating in the northern tier comes from stations where the two lines do not compete. The amount of traffic on which competition between the Northern Lines now exists is thus far less than the Department suggests, and virtually all of this traffic is subject to substantial competition—rail, intermodal, or both—that will continue after merger.

D. The Commission properly considered the extensive and growing intermodal competition in the applicants' territory as supporting approval of the merger. A large and expanding network of motor carriers, including exempt and private carriers, now serve all of the important points and areas served by the Northern Lines. Their vigorous competition, which extends to long hauls and to the important forest and agricultural products of the Northwest, has deprived the railroads of significant traffic and has compelled them to reduce rates. Additional intermodal competition comes from waterways, pipelines and airlines. The evidence shows that intermodal competition will intensify in coming years due to developments such as the expansion of major

interstate highways. In appraising the effects of the merger on competition, the Commission properly gave weight to the fact that the transportation services available to the public include these extensive and growing intermodal operations. The Commission also properly considered the fact that the merger, by making it possible for the railroads to provide faster and better service, will increase their ability to compete with the highway and other intermodal carriers.

E. The Commission properly gave weight to the widespread support for the merger by shippers, producers and public agencies in the northern tier and elsewhere in the area served by applicants. The direct interest of the shippers in adequate transportation service impels them to examine the proposed merger with great care and their practical, first-hand appraisal of its consequences is particularly valuable. The shippers, who provided virtually unanimous support for the merger, made it clear in detailed testimony that in their view the benefits of the merger will outweigh the elimination of competition between the Great Northern and the Northern Pacific.

III

The contentions of the City of Auburn are without merit. The city's argument that the record should have been reopened to receive evidence on subsequent developments is belated; the city did not seek a reopening, did not offer evidence at the reopened hearings in 1967 and did not seek reconsideration of the Commission's order approving the merger. In any event, the subsequent development principally relied upon by Auburn lessens the alleged adverse impact on the city. The city will receive ample service from the merged company as well as from the Union Pacific and Milwaukee. The Examiner and the Commission gave ade-

quate attention to the city's position and correctly determined that the local and temporary adverse consequences alleged by Auburn were not significant when compared with the improvements in transportation service that the merger will bring to communities and shippers throughout the applicants' system.

IV

There is no support in the Interstate Commerce Act or in its legislative history for the Department's alleged statutory "guidelines" that would prohibit a merger which eliminates "substantial competition" in the absence of benefits above and beyond provision of more efficient and economical transportation service and that would preclude the Commission from giving weight to improvements in the carriers' financial position unless that position is so "precarious" as to threaten the carriers' ability to provide transportation service. These alleged "guidelines" are inconsistent with the statutory standards set forth by Congress and applied by this Court in upholding Commission approval of mergers which promote better and more efficient and economical transportation service. Where mergers are in the public interest, as measured by the transportation standard, this Court has sustained the Commission's approval of mergers even though the mergers eliminated substantial competition, the carriers involved were not in precarious condition, and there was no showing of extraordinary benefits such as the Department demands. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 88-89; *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla. 1966), aff'd *per curiam* 386 U.S. 544. The Department's "guidelines" are an attempt to make competition the controlling consideration in railroad merger proceedings and thus substitute the policies of the antitrust laws for the policies of the Interstate Commerce Act con-

trary to the intent of Congress and the decisions of this Court. *E.g., Penn-Central Merger Cases,* 389 U.S. 486, 499-500; *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87.

The Department's particularized guidelines are also at odds with the Congressional delegation of authority to the Commission to apply, by the exercise of its informed and expert judgment, the general standard and directions of the statute to the facts of particular cases. The Department's argument is, in essence, a disagreement with the Commission over its appraisal of the evidence and an attack upon the wisdom of the Commission's decision and cannot be reconciled with the standards this Court has fixed for judicial review of Commission orders. *E.g., Penn-Central Merger Cases,* 389 U.S. at 498-499; *Minneapolis & St. L. Ry. Co.* v. *United States,* 361 U.S. 173, 187-189.

ARGUMENT

I. THE COMMISSION'S DECISION RESTS UPON A CORRECT UNDERSTANDING AND APPLICATION OF THE STANDARDS OF THE INTERSTATE COMMERCE ACT.

In its Second Report the Commission stated that in considering whether to approve a merger proposal it was bound to apply the standards found in Section 5(2) of the Interstate Commerce Act and in the National Transportation Policy declared by Congress (App. 273). It recognized that the basic statutory criterion—whether a merger would be "consistent with the public interest"—"has a direct relation to the adequacy of our transportation system, to its essential conditions of economy and efficiency and to appropriate provision and best use of transportation facilities." *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25 (App. 277).

The Commission complied with the Congressional directive in Section 5(2)(c) of the Act that in determining whether a proposed transaction was consistent with the public interest it should give weight to four specified considerations, among others: "(1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected" (49 U.S.C. Sec. 5(2)(c); App. 276).[31]

The Commission was also fully aware that it was required by statutory standards to consider the effects of a proposed merger on both intramodal and intermodal competition (App. 277-278). In dealing with that aspect of the present merger the Commission was guided by the decision of this Court in *McLean Trucking Co.* v. *United States,* 321 U.S. 67. The relevant passage from the opinion in that case, which was reiterated by this Court in *Minneapolis & St. L. Ry. Co.* v. *United States,* 361 U.S. 173, 186, 187, 188, and *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 156, follows (321 U.S. at 87-88):

> "In short, the Commission must estimate the scope and appraise the effects of the curtailment of competition which will result from the proposed consolidation and consider them along with the advantages of improved service, safer operation, lower costs, etc., to determine whether the consolidation will assist in effec-

[31] The Commission gave careful consideration to each of these matters. No railroad requested inclusion in the merged system but the Commission did consider the effect of the merger upon other railroads operating in the same areas as applicants and prescribed conditions for the protection and benefit of those other carriers (see pp. 63-81, 124-125, below).

> tuating the over-all transportation policy. Resolving these considerations is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry. Congress left that task to the Commission 'to the end that the wisdom and experience of that Commission may be used not only in connection with this form of transportation, but in its coordination of all other forms.' 79 Cong. Rec. 12207. 'The wisdom and experience of that commission,' not of the courts, must determine whether the proposed consolidation is 'consistent with the public interest.' [Citations omitted.] If the Commission did not exceed the statutory limits within which Congress confined its discretion and its findings are adequate and supported by evidence, it is not our function to upset its order."

In the present case the Commission followed precisely the directions set forth in this passage. It estimated the scope and appraised the effects of the curtailment of competition that would result from the merger and weighed those consequences against the improved service, the lower costs and other transportation advantages that the merger would produce. It made findings on these matters which, as we shall show below, are supported by substantial evidence. The Commission then weighed the relevant considerations and determined that on balance the merger would "assist in effectuating the over-all transportation policy" and w therefore in the public interest.

In its consideration the Commission did not treat the preservation of competition as of secondary or subordinate importance. On the contrary, as the District Court held (App. 21), the Commission recognized "the importance of competition as an indispensable factor in the public interest equation" (App. 277-278, 315). At the same time the Commission did not, as the majority did in the First Report, treat the preservation of competition between the two

Northern Lines as being in itself a decisive and controlling consideration. It recognized that under the decisions of this Court the preservation of competition between applicant carriers, although an important factor, "is significant chiefly as it aids in the attainment of the objectives of the national transportation policy," *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 85-86, and that it was not to measure merger proposals "by the standards of the antitrust laws," *Minneapolis & St. L. Ry. Co.* v. *United States,* 361 U.S. 173, 186 (App. 277-278).[32]

There is no warrant for the suggestion of the Department of Justice that the Commission here approached its task in the belief "that its attitude toward mergers should be more favorable than the neutral balancing approach articulated in the First Report" (D.J.Br. 63). In its discussion of the statutory criteria the Commission explicitly stated (App. 276):

> "[T]he public interest scale is at balance, weighted neither for nor against merger in a particular case. Solely by the evidence bearing upon public interest can the balance be tipped."[33]

And the Commission's careful consideration of the relevant statutory factors and its detailed findings relating to those

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[32] The Commission pointed out in its report of April 11, 1968, that "the perspective with which we appraised competition in the reconsideration report and the construction we placed on section 5 as to its underlying purpose, are no longer open to question in view of the Supreme Court's decision on these matters in *Penn-Central Merger Cases,* 389 U.S. 486 . . ." (App. 476).

[33] Presumably in making its suggestion the Department simply overlooked this statement by the Commission in the Second Report; we assume that the Department does not intend to charge that the Commission deliberately misrepresented its own state of mind.

factors show that it did not depart from this principle in making its ultimate determination.

The Department also criticizes the Commission on the ground that "the Second Report gives no evidence that the Commission now felt itself limited by any standard other than its general notion of the overall 'public interest'" (D.J.Br. 63). Since the statute itself states that the standard is "the public interest," and since the Commission cannot fairly be criticized for making its own determination of the question that Congress had authorized it to decide, the point of this criticism is not apparent from the literal meaning of its words. It may be that the Department intends to convey the implication that the Commission believed that the term "public interest" was so vague and indefinite as to give it practically unbridled discretion in approving rail mergers. If so, there is no justification for the implication. As we have pointed out above, the Commission was fully cognizant of the limitations imposed upon its authority. It applied the public interest standard as interpreted by this Court in *New York Central Securities Corp.* v. *United States,* 287 U.S. 12, 25, and other decisions; it complied strictly with the directions given it by Congress in Section 5(2)(c) of the Act; and it carefully discharged its obligation to consider and to weigh all relevant considerations in deciding the effects of the proposed merger on competition.

Furthermore, the Commission's findings demonstrate that the Commission did not act on any assumption that it was endowed with unlimited discretion. In themselves they suffice to show that the Commission correctly understood and applied the standards that Congress directed it to observe. We shall next consider those findings as they relate to the benefits that the merger, as conditioned by the Commission, would bring to the transportation facilities and services of the applicants and other railroads, on the

one hand, and to its limiting effects on competition, on the other. This discussion will also serve to illuminate certain points that will be involved in a later consideration of the asserted statutory criteria that the Department of Justice alleges the Commission disregarded or misapplied in approving the merger (see pp. 126-138, below).

II. THE COMMISSION'S DETERMINATION THAT THE PUBLIC BENEFITS OF THE MERGER OUTWEIGH ITS LIMITED ANTICOMPETITIVE EFFECTS RESTS UPON REASONED FINDINGS THAT ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

A. The Merger Will Produce Important Benefits for the Producing and Shipping Public Served by the Merging Roads and for Employees.

The Commission found that the merger as conditioned in the order of approval would achieve "overriding benefits to the public through improved transportation" (App. 344). It supported this determination by detailed findings that, among other benefits, the merger would provide faster and more dependable service and better car supply for shippers; would increase the shippers' choices of routes and provide them with more advantageous transit privileges, partial loading and unloading privileges, and reconsignment and diversion privileges; would provide economies that would tend to hold down the rates; would directly lower the rates on certain shipments; would strengthen the financial condition and the rate of return of the carriers thus enabling them to compete more vigorously and to furnish better service; and would benefit the carriers' employees. These findings are supported by substantial evidence and fully justify the Commission's evaluation of the benefits of the merger.

1. *Faster and More Dependable Transportation Service*

The Commission found that the shippers will benefit directly "from faster and more dependable single-line service, extremely important here in view of the long distances involved and the nature of the products of the Northwest" (App. 305).[34] These improvements in service will result from changes such as the creation of new internal routes combining the shorter and most advantageous portions of the separate Great Northern and Northern Pacific routes; construction of unified yards at Seattle, Spokane and Minneapolis and unification of facilities at numerous points; elimination of delays now involved in the necessary interchange of cars between the separate roads; and grouping of cars at Galesburg and Cicero, Illinois (Burlington yards) to enable blocked trains to move north and west without intermediate reclassification of the cars (App. 305-307, 718-719).[35]

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[34] Noting that "one of the prime benefits of consolidation will be that shippers and consignees will receive substantially faster service, and receive more dependable, on time, delivery of their commodities," the Examiner stated (App. 718):

> "Shorter transportation time by concentrating the transcontinental traffic of Northern Pacific and Great Northern over shorter or more favorable operating routes from the Pacific Northwest to connections with Burlington at Laurel, Sioux City and Twin Cities, will bring the great Northwest area closer to the more heavily populated areas of the country where the markets are located. Moreover, the proposed improvements will enable New Company to be more competitive particularly with public and private motor carrier transportation, will aid in stemming loss of traffic from the rails, and will reduce the waste involved in damage and delay in shipments."

[35] The Commission found that inclusion of the Burlington is necessary "not only for the reason that the Burlington, in our opinion, is necessary to the proposed system if it is to fully achieve the results for which it is being created, but also in order that the many shippers and receivers served by the Burlington may participate in the public benefits flowing from the unification" (App. 338).

Concrete illustrations of the improvements in transit time were described by the Commission (App. 306-308) and by the Examiner (App. 720-727). For example, the Commission found that agricultural products of the Yakima Valley in Washington will "reach Chicago about 12 hours, and Kansas City about 24 hours earlier, while Wenatchee (Wash.) fruit would arrive at Chicago more than 9 hours earlier. Great Northern traffic from Spokane and west thereof through Laurel [Montana] would be advanced 24 hours in moving via Northern Pacific's short line, and other faster schedules would generally improve deliveries at Chicago by about another 24 hours by avoiding municipal switching and spotting prohibitions . . ." (App. 306). "Seattle will be brought closer to East St. Louis [an interchange point] by 20 hours, 30 minutes on the fastest schedules" (App. 720). "Shipments from Chicago to Forsyth [Montana], which now require an elapsed time of 71 hours, 45 minutes, or 64 hours, 5 minutes, would be handled after unification in 35 hours, 15 minutes" (App. 723). Service from various Montana and North Dakota points to Minneapolis would be speeded up "for most of the stations as much as 24 hours" (App. 724).

In connection with its finding that "These transactions will produce faster trains," the Commission found that "Applicants' most expedited high-volume heavy-power service from Seattle to Chicago is now scheduled at 94.5 and 97.25 hours. Under unification these would be replaced, respectively, by 82.5 and 84-hour service" (App. 306). The use of the new shorter and more efficient route between Seattle and Chicago, use of new unified yards and elimination of interchanges will enable the applicants to give this better service. The Department argues that these improvements in train schedules could be achieved without merger

and attempts to support this argument by pointing to an expedited train service between Seattle and Chicago that was initiated during this proceeding (D.J.Br. 14, 59).[36] The Department, however, fails to mention that these trains were short, light tonnage trains drawn by high horsepower locomotives. It is only through the merger that the applicants will be able to eliminate the interchange delays, create a shorter and more efficient route using the best portions of the existing routes, and unify their operations, thus expediting the schedules for the normal high-volume trains that are used in general freight service. The Department also fails to mention that the merger will permit improvements in the present schedules of the short, light tonnage trains. The contention here advanced by the Department was earlier urged by another party and found by the Commission to have no merit.[37]

The testimony of shippers emphasized the great importance to them of both the faster service and the greater dependability that would result from unification. "Although savings in elapsed time between major terminals of as

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[36] These faster trains were initiated because of faster schedules instituted by the Milwaukee—an example of competitive pressure that will continue after the merger (see pp. 64-65, below).

[37] The Commission stated (App. 467-468):

> "However, as the applicants point out, the petitioner in repeated attempts to show that service to the public resulting from the merger will not be improved over present service, persists in comparing the individual applicants' present expedited schedules for short, light-tonnage trains pulled by high-horsepower locomotives, with schedules of normal trains providing general freight service, without taking into consideration the shorter and more efficient routes and more dependable schedules the merger will make possible for the normal trains. There is nothing in the petitioners' argument to establish that even present expedited train service will not be improved as a result of the merger."

much as 24 hours is of benefit to many shippers and receivers, the improvement in reliability is perhaps of even greater importance to many. A few hours earlier arrival of time freights at any station under proposed schedules provides additional leeway and greater flexibility to assure actual delivery to the industry at the desired time. . . . Dependability of service, with on-time arrivals and deliveries, particularly to connecting lines, is important" (App. 726).

"Expectation of faster service or more dependable service, or both, was stressed by 191 shipper or shipper association witnesses as reason for support of the applications" (App. 750). The reasons why these factors are so important to shippers vary widely with the nature of their production or business activity; numerous illustrations are set out in the findings (App. 750-757).

For instance, a witness for an association of fruit growers in Oregon and Washington testified regarding the faster service for shipments through the Omaha, Kansas City and Twin Cities gateways that "The shorter transit time will minimize deterioration, thus assuring better quality fruit for the consumer and the best possible market price for our producers" (Tr. 5665-66). A distributor of anhydrous ammonia fertilizer testified that "Any delay in terminal handling or line-haul movement can not only mean a loss of business to us but can have serious consequences to the local farmers and growers who depend on speedy delivery of our product" (Tr. 4007). The president of a large wholesale grocery distributor at Great Falls, Montana, testified that "This decrease of transit time and the more reliable service is important to us because the modern retail grocery cannot carry large stock and must be able to replenish supplies rapidly, and fast and reliable

transportation from our various points of supply will allow us to adequately service our retail customers with smaller inventories, without at the same time tying up our capital in unnecessarily large inventories of our own" (Tr. 13194-95).[38]

2. *Better Car Supply for Shippers*

It is highly important to shippers in the producing areas of the Northwest to have cars to load at the time when they are needed. Adequate car supply in the shipping seasons has long been a problem.[39] The Commission found that as a result of the merger "Shippers will further benefit from improved car supply . . ." (App. 305) and it summarized some of the evidence which shows why the merger will improve car supply (App. 309). For instance, the Commission noted that "Through the faster turnaround time made possible by shorter routes and facilitated terminal handling, it is anticipated that 639,097 car days (the equivalent of

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[38] The general traffic manager of International Paper Company, operating 80 mills and manufacturing plants in 30 states, testified regarding forest products (Tr. 7431):

> "If the northwest is to adequately compete with factories in other parts of the country closer to large eastern markets, these products must move safely and swiftly to destination. With regard to rail transit time on our forest products, I would welcome any possible improvement in service. Naturally, faster service is important but of even greater importance is a more dependable service. . . . If these delays could be eliminated thereby providing a more regular service, it would help us in planning production and shipping and avoid many customer complaints."

[39] The Examiner stated that "the evidence of numerous shippers shows likewise that it [car supply] has been and continues to be a persistently recurring and worrisome problem" (App. 732).

1,750 cars daily) would be saved . . ." (App. 309). The Examiner described other ways in which the merger would alleviate the problem (App. 732-737). Among other things, he stated (App. 733-734):

> "The centralized responsibility for the acquisition, distribution, supervision and control of all freight equipment in a single transportation department, as proposed, would permit the ordering of cars from place to place on the consolidated system to meet anticipated requirements with full assurance of prompt availability to the areas of highest current loading needs, whereas at present each line must look to its own interests and appeals to each other are ineffective compared to the degree of control which would be exercised under the consolidated system. That situation is best evidenced by the fact that the requirements for box cars reach their peak at different times on each of applicants lines, but so close together that one line is reluctant to release its surplus cars to another line which is experiencing peak demand for fear of not being able to obtain return of the cars in time to meet its own demands, with the result that cars remain idle on one railroad at times when they are in short supply on another.
>
> Similarly, the present situation of back hauls of empty cars on the line of one applicant while another applicant is moving empties in the reverse direction would be eliminated, and empties would be routed to the point of nearest demand. The change would permit the reduction of empty car miles and make empty cars more readily available to meet shippers' requirements, and produce other incalculable economies through elimination of duplicate energies which are unproductive."

"More than 150 shipper and shipper association witnesses evidenced an anticipated improvement in car supply as a reason in support of unification . . ." (App. 757). Each

testified as to his own circumstances and illustrations were summarized by the Examiner (App. 757-763).

One witness, asked on cross examination how the supply of refrigerated cars would be helped in his territory, answered as follows (Tr. 5704-05):

> "A. It would be helped in this way. May I cite an example? We have car shortages in Yakima when there is a surplus of cars in Wenatchee. I have heard shippers in Yakima [served by Northern Pacific] crying for cars. I have driven over to Wenatchee [served by Great Northern], I have seen a block of empty refrigerated cars sitting on a siding in Trinidad and the apple yard, and the Great Northern was holding those cars there because two or three days later, whatever it may be, to meet their needs.
>
> "Now, the reverse has been true. We have had surpluses in Yakima when Wenatchee was short, but if there was one person dispatching those railroad refrigerator cars, when they came into Spokane, instead of sending them all out to Wenatchee because they come in on the Great Northern, they could see the need is greater in Yakima and the cars that are coming in today, we will split up according to need. You would get a better utilization, and you are just bound to get a better car supply because you have a better utilization of the cars that are available."

3. *More Advantageous Transit and Routing Privileges, Lower Rates and Other Benefits for Shipping Public*

More than 145 shipper and shipper association witnesses testified about the benefits to shippers from the more advantageous transit and routing privileges that will become available to them upon consummation of the merger (App. 763). The Commission found that "Shippers will further benefit from . . . wider routing with more liberal transit privileges, partial loading and unloading privileges, and

reconsignment and diversion privileges . . ." (App. 305). After noting the reasons why merger will produce this result, the Commission stated: "The expansion of transit privileges benefits producers and processors of numerous commodities important to this area, including lumber, grain, feed, fertilizer, and iron and steel, and ingredients and products made from those commodities" (App. 308).

Transit privileges permit the shipper to stop a shipment en route (for various tariff-specified purposes such as storing, processing or fabrication) and yet obtain for the two movements, inbound and outbound, the benefits of the lower through rate from origin to eventual destination. In the protection of a railroad's own long haul and the revenues therefrom, such privileges are usually confined to traffic that moves both in and out on the same railroad (Tr. 449).[40] Since the merged company will operate as an integrated system no problem of short hauling the inbound or outbound carrier will be involved and as a result shippers will receive transit and similar privileges which are not available to them as long as the applicants operate as independent lines.

The details in this respect were described by the Examiner, together with descriptions of numerous illustrations from the testimony of the shipper witnesses (App. 763-769). As those illustrations show, shippers who now ship inbound on one of the applicants and outbound on another applicant will obtain transit and similar privileges that will result in lower rates. For those who now confine the two movements to one road in order to obtain the transit

[40] "The propriety of a railroad protecting its long haul is specifically recognized in Section 15(4) of the Interstate Commerce Act" (App. 83).

privilege, "unification would permit them to broaden their marketing area and their sales" (App. 764). Similar benefits are associated with the other shipper privileges mentioned above that will become expanded when the unification is effective.[41]

In addition to the transit and other privileges, the Commission found that shippers will derive benefits from generally lower single-line rates, in lieu of the combination of two separate single-line rates that now apply on some traffic moved over the lines of two of the applicants (App. 309-310). It also found that shippers will benefit from improved tracing and claim services and that "Clerical time [of shippers] would be saved on such matters as car ordering, tracing, and diversion, and demurrage and freight accounting costs would be reduced" (App. 309-310). Speaking of these and other circumstances, the Commission found (App. 309):

> "The shipper benefits resulting from these factors are spread throughout the whole spectrum, resulting in faster transit and quicker delivery times, less damage

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[41] Shippers located on the lines of the Milwaukee and the North Western will also obtain more advantageous transit privileges and similar benefits. Referring to the numerous gateways that will be opened between the merged road and the Milwaukee and North Western roads (pp. 66-70, 77-78, below), the Commission stated (App. 311):

> "Not the least of the benefits thereof will be the opening of new markets, transit points, and sources of supply for shippers and receivers located on applicants' lines who cannot now reach points on the Milwaukee not served by applicants, and those located on the Milwaukee to whom applicants' lines are now closed. The same purposes, on a smaller scale will be served by opening two gateways to the North Western at Oakes and Crawford."

and fewer claims, easier tracing, and overall, a more expedited and satisfactory service."[42]

4. Achievement of Large Economies and Reversal of Downtrend in Rail Earnings

Ever since the mid-1950's, when the applicants began to feel the full force of highway, waterway and pipeline competition, the applicants' earnings from railroad operations have been declining severely. One of the major benefits of the merger is that it will eliminate large amounts of unnec-

[42] The Department argues that the benefits described at pages 42-50 above could be achieved by the applicants without merger by "greater coordination of services and utilization of new techniques" (D.J. Br. 59). The Commission, however, found that "many of the coordinations, though physically feasible, would produce grossly unequal benefits to GN and NP as separate carriers. . . . [and that] competition between the Northern Lines renders it difficult if not impossible, as a practical matter, to incur the expense involved in effecting such coordinations" (App. 300). The Examiner found that "there can be no reasonable expectation that voluntary coordination among them as separate companies could result in the same or similar improvements that unification will permit" (App. 1088). The Department's argument ignores the realties of railroad operations. The improvements in service brought about by unification of various facilities, by routing of trains over the shortest combination of routes, by eliminating delays due to exchange of cars between railroads, and by similar arrangements involve costs and rewards that differ as between the two Northern Lines. Many of the improvements also involve the surrender of competitive advantages, *e.g.*, the use of a shorter route of one line for traffic of the other, the relinquishment by each line of its independent control over car supply, and the surrender by each of its right not to be short-hauled. These improvements are thus not feasible if the two railroads are independent competitors. The fact that the Northern Lines have been operating for many years without making the coordinations necessary to achieve the service improvements that will come from the merger is itself proof that these improvements will not be achieved absent unification.

essary expenses. These economies will reduce the upward pressure on rate levels and will enable the merged company to make investments in cars and other facilities that will provide more and better service to shippers. Thus the merger in the words of the National Transportation Policy will "promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation . . ." (49 U.S.C., preceding Sec. 1).

(a) *Applicants' 40 percent Shrinkage of Rail Earnings*

The Commission described the downtrend in applicants' rail earnings in terms of annual averages for each of the five-year periods from 1951 to 1965 (App. 298-299). The findings show that the applicants suffered a shrinkage of approximately 40 percent in those years; their net railway operating income before federal income tax in the 1961-1965 period of general national prosperity and increasing prosperity in the Northwest was only 60 percent of what it had been in the 1951-1955 period.

The pre-tax annual average in 1961-1965 was $47.7 million less than it had been in 1951-1955. "The combined average, for all of the applicants, fell from $121.6 million during 1951-1955 to $86.9 million during 1956-1960, and to $73.9 million during 1961-1965" (App. 299). The Commission pointed out that the earnings of Burlington during this 15-year period "followed a similar pattern" as those of Great Northern, Northern Pacific and SP&S, resulting in the large reduction for all of the applicants.

The earnings for the three most recent years, 1966-1968, show a two-year very sharp reduction in 1967 and 1968 following a temporary improvement in 1966. The annual average combined net railway operating income of all the applicants for that latest three-year period, before federal income taxes, was $74.3 million. It was $47.3 million less

than the 1951-1955 average and $55.9 million less than the three-year 1951-1953 average. The similar average for the two years 1967-1968 was only $56.3 million; it was $65.3 million below the 1951-1955 average.[43]

The significance of the warning contained in the applicants' continued loss of rail earnings is increased by the fact that the foregoing figures are in terms of dollars that have not been adjusted to reflect the dollar's loss of purchasing power during the 1951-1968 period. In terms of constant dollars, to reflect purchasing power for new equipment or facilities, the applicants' rail earnings have fallen even more drastically than the data shows.

The Justice Department does not refer to the Commission's finding showing that there has been a severe deterioration in applicants' rail earnings before taxes. Instead the Department repeatedly characterizes the applicants as being "prosperous" (D.J.Br. 6-7, 21). It is true that the Commission found that the applicants have "enjoyed a moderate degree of success." But it also found on the basis of substantial evidence that they are faced with "increasing competition and an inability to prevent traffic erosion," that the comparisons of applicants' railway earnings over the years, described above, "do tend to place applicants' financial position in proper perspective" and that it is "necessary that applicants take measures now to assure continued success for the future" (App. 298).

(b) *Applicants' Low Rate of Return on Investment*

The applicant railroads' rate of return on investment is

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[43] Data for 1951-1953 and 1966-1968 derived from railroad Form A reports to the Commission. Earnings of each of the Northern Lines for the first six months of 1969 were lower than for the first six months of 1968 (Quarterly reports, Form R&E, filed with the Commission).

even lower than the average rate of return for all Class I railroads in the country.[44] One of the benefits of the merger is that it will increase the rate of return and thereby encourage capital expenditures for acquisition of new equipment and facilities.

The Commission properly took this situation into consideration in its Second Report (App. 299):

> "The average rate of return for applicants during the 15-year period above referred to ranged from a high of 3.73 percent in 1955 to a low of 2 percent in 1961. Even in 1965 and 1966 when the average rate of return of class I railroads was 3.69 and 3.9 percent, and that of other industries much higher, applicants' average was 3.33 and 3.7 percent—less than the yield on non-risk Government bonds. Upon merger, the relatively low rate of return will be enhanced. Low rates of return, if continued, may well pose serious obstacles in attracting necessary investment capital and affect reinvestment decisions by the rails as well."

The situation thus described by the Commission regarding the applicants' abnormally low rate of return continued, and worsened, in 1967 and 1968. Applicants' average in 1967 was only 2.08 percent and in 1968 it was 2.41 percent.[45]

The public interest in increasing the railroads' rate of return was recognized by both the Commission and the District Court in approving the merger of Seaboard and Atlantic Coast Line and the rate of return of those roads was *above* the national average. *Florida East Coast Ry. Co.* v. *United States,* 259 F. Supp. 993, 1013 (M.D. Fla.

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[44] A Class I railroad, under I.C.C. rules, is one with annual revenues of $5,000,000 or more.

[45] The 1967 national railroad average rate of return was 2.45 percent. *Ex Parte No. 259,* 332 I.C.C. 590, 603 (1968).

1966), aff'd *per curiam* 386 U.S. 544. See also *Penn-Central Merger Cases*, 389 U.S. 486, 501. The Department says that "there is simply no basis in this record to conclude that without the incentives of competition a greater return on rail operations will be produced" (D.J. Br. 58, n. 42), but the argument's premise that there will be no competition after the merger is untrue in fact. The merged line will be faced with substantial competition from other railroads, including the enhanced competition of the Milwaukee and the North Western, and with vigorous competition from trucks and other modes of transportation. Furthermore, there is direct and substantial evidence that the merger will produce a greater return on the rail operations of the applicants. This increase will necessarily result from the approximately $40,000,000 annual savings that will be achieved by the merger and by the applicants' increased capacity, through improved service, to win back traffic which has been diverted from their rails to other modes of transportation.[46]

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[46] In the same footnote sentence, the Department mentions the "unique accounting practices of the railroad industry" and questions the merit of comparisons of railroad rates of return with those of other industries (D.J. Br. 58, n. 42). The fact is that applicants' net income, as reported to the I.C.C. on its accounting principles, is *higher* than when restated on the basis of generally accepted accounting principles used in other industries. For example, Great Northern's proxy statement of February 12, 1968 (for the stockholders' meeting to approve the merger as conditioned) showed that restating Great Northern and Northern Pacific net income on a basis of generally accepted accounting principles results in reducing their reported earnings by from $2.4 to $5.6 million for each road in each of the four years shown in the statement.

(c) *Merger Savings of $40,000,000 Annually*

On the basis of an extensive record, the Commission found that this merger will result in savings of approximately $40,000,000 annually (App. 257-266, 299-304). It stated that "On the whole, we are convinced that the updated estimates are a reasonably accurate portrayal of the savings attributable to the proposed unification" (App. 301).[47] The District Court reviewed the record and determined that the Commission's findings were supported by the evidence (App. 38-42).

The importance of achieving these economies is emphasized in this case by the severe shrinkage in applicants' rail earnings, described above. The prospective savings will halt and reverse the downward trend. As the Commission found, "The improved financial posture mentioned above will enable applicants to become stronger and more stable, and thus be better equipped to meet the growing competition now being felt" (App. 302).

In this Court the Department does not undertake to review the evidence concerning merger savings in any detail. Instead, it argues broadly that the economies should have been excluded from consideration in appraising whether the merger will be consistent with the public interest (D.J.Br. 56-57). The Department bases that proposition on its assertions, first, that the savings may not necessarily be passed on to shippers or used in transportation activities; second, that they may fall short of the estimates; and, third, that "many cost savings can be achieved without merger" (D.J.Br. 57). There is no merit in any of these assertions.

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[47] The savings "will begin to be realized almost immediately after merger but . . . the full amount will probably not be realized until approximately five years after the date of the merger" (Ex. 244, p. 2; App. 262-263).

The ability of railroads to operate more economically is clearly beneficial to the shipping public. As the Commission found (App. 305-306):

> "Many of the operational changes that benefit applicants and make possible the savings, would inure to the benefit of shippers as well. . . . Thus applicants' ability to operate more efficiently and at lower cost should be reflected in the service and rates afforded shippers and receivers. . . . Overall lower-cost transportation will also redound to the benefit of those shippers disadvantaged due to location and low-rated commodities."

There was substantial evidence to support this finding. For example, the president of the Great Northern testified as follows (Tr. 199):

> "These shippers will be interested to know that the savings and economies incident to our merger will put the New Company in a better financial position to maintain freight rates low enough to allow them to meet competition from more favorably situated sources of supply and to establish new rate adjustments which will encourage the location of industries along our lines."

A witness for the Province of British Columbia, an intervenor, said (Tr. 13224):

> "No promises or assurances of rate reductions or concessions have been made to the province but it is the conviction of this province, based on its ownership of railroads, that economies in the long run are reflected in rates. It is because of this conviction we support the merger."[48]

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[48] The Examiner stated: "While applicants have made no assurances to reduce their freight rates following unification, it is reasonably expected that the economies from unification will tend to hold down the number or amount of additional rate increases in future years, even though rates of pay and prices of railway supplies may continue their upward course" (App. 739).

Testifying about use of part of the savings to purchase new cars, the president of the Northern Pacific stated (Ex. 215, pp. 9-10):

> "We wish to give full assurance, however, to the Commission that within the limits of our resources we will own and maintain an adequate car supply by any reasonable test as to what that ownership should be. We also would undertake to own and maintain an adequate supply of special type or special purpose cars within the limits of our resources and in accordance with any reasonable determination as to what our ownership should be. We would expect, therefore, that our resources, including the operating savings accomplished through consolidation, would be in part used for this purpose."

There was additional and specific testimony by executives of the applicants with respect to the investments that the merged company would make to improve freight yards and bridges, signalling and communications systems (Tr. 200-201, 332; Ex. 217, pp. 18-19).

There is no merit in the Department's contention that the Commission should not have given weight to the economies because the economies possibly may not be as large as the estimate. The Commission recognized that "with the passage of time, when an approved merger finally is consummated, it will realize savings which were not anticipated, while other anticipated savings are not achieved" (App. 304). No one can guarantee that economies of a precise amount will be realized but the Commission also recognized that the actual economies may well be larger than the estimate. Indeed, the estimate itself was deliberately made on a conservative basis to allow for contingencies that might, or might not, develop to decrease the savings. As shown by the table in the Commission's Second Report, the "Total savings" are estimated at $41,688,000 but this is reduced by a "Contingency allowance" of $2,015,000 (App.

259, column 4). The reasons for and the calculation of this allowance for contingencies were stated in the Report (App. 260).

The conservative character of the estimate is further indicated by the fact that the savings from possible abandonments of segments of parallel and duplicate lines (estimated at more than $3 million annually) are totally excluded from the final estimate (App. 260, n. 6). Moreover, since most of the economies will result from reductions in employee positions, and since it is common knowledge that rates of pay are headed upward, the economies from the positions eliminated will in all probability turn out to be much more than the estimate shows.

The Commission's findings on the merger savings in this case rest upon a careful analysis of extensive and detailed evidence received both at the original hearing and at the hearing in 1967. Their validity is not impaired by the Department's citation of publications not of record and relating to other mergers which the Department inaccurately alleges demonstrate that the savings achieved by a merger "generally fall short of the proponent's estimates" (D.J.Br. 56-57, n. 41).[49]

In asserting that in the First Report "many cost savings" were excluded from the estimate on the ground that they

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[49] The publication entitled *Western Railroad Mergers*, cited by the Department, does not support the proposition that savings "generally" fall short of estimates. Of the nine mergers mentioned in the study (p. 11), "Performance Relative to Expectations" is listed as "excellent" for one merger, "good" for four mergers, "fair" for two mergers and "poor" for only two mergers.

A *New York Times* item on page 31 of the July 26, 1969, issue reports the president of the recently merged Seaboard Coast Line Railroad as having stated that "in the six months ended June 30, his road's operating ratio—the percentage of gross revenues consumed by expenses—had been cut from 79.3 to 74.2. This was the lowest for either predecessor company for more than a decade."

could be achieved without merger, the Department fails to note that the First Report states: "We recognize that applicants cannot achieve by voluntary coordination savings that approach those which could be achieved by merger" (App. 127). The savings that were excluded in the First Report amounted to only $5.2 million (App. 300). Applicants' petition for reconsideration pointed out in detail why the First Report's conclusion in regard to the $5.2 million was contrary to the evidence and, in the Second Report, the Commission properly found that the $5.2 million reduction was not warranted (App. 300). As the Commission found, "many of the coordinations, though physically feasible, would produce grossly unequal benefits to GN and NP as separate carriers. Further, as concluded in the prior report, competition between the Northern Lines renders it difficult if not impossible, as a practical matter, to incur the expense involved in effecting such coordinations" (App. 300; see Tr. 268-269, 283). Coordination at common points, such as unification of facilities at the Twin Cities, was one of the principal purposes of the 1927 proposal for unification of the Northern Lines. *Great Northern Pacific Railway Company Acquisition*, 162 I.C.C. 37, 47-48 (1930). The fact that these coordinations never were made when the unification was not consummated confirms the Commission's conclusion that such coordinations and their consequent savings can only be achieved through merger.[50]

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[50] The applicants' estimates of savings resulting from the merger were based upon studies made by the independent transportation engineering firm of Wyer, Dick & Co. (App. 256). As a basic principle adopted in making the estimates, the Wyer report explicitly states that economies and improvements that could be realized without consolidation were excluded from the studies (Ex. 4, p. 17). The Commission noted in the Second Report that the Wyer study was accepted by the majority opinion in the First Report as "a reasonable estimate of savings achievable by merger" except for the $5.2 million reduction noted above and one other revision (App. 300).

The Department also reiterates here an argument that it advanced unsuccessfully in the *Seaboard-Coast Line* merger case. The Department would have the Commission give weight to merger savings regarding "carriers in precarious financial condition" but disregard or give minimal weight to those benefits where the merging carriers "are already healthy and able to provide efficient service" (D.J. Br. 57-58). Approving the merger of Seaboard and Atlantic Coast Line, the District Court, in a decision affirmed by this Court, stated (*Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993, 1010 (M.D. Fla. 1966), aff'd *per curiam* 386 U.S. 544):

> "The Government argues that the present merger is different in that it involves two healthy, stable railroads and not a failing company. *Associated*[51] involved not only seven healthy trucking companies, but probably seven of the most healthy trucking companies in the United States. The national transportation policy and the Commission have always looked at benefits going far beyond the saving of a failing company."

The achievement of economies that will result from this merger clearly is a material benefit in the public interest. It is in accord with the National Transportation Policy to promote "economical, and efficient" service and to foster "sound economic conditions in transportation and among the several carriers." This would be true even if the applicants' rail earnings were stable or growing; the economies are particularly important here in view of the marked shrinkage of their earnings.[52]

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[51] *Associated Transport Inc.—Control and Consolidation—Arrow Carrier Corp.*, 38 M.C.C. 137 (1942), sustained *sub nom. McLean Trucking Co.* v. *United States*, 48 F. Supp. 933 (S.D. N.Y. 1942), aff'd 321 U.S. 67.

[52] The Department in a footnote complains that the Commission denied certain of its requests for discovery (a matter not mentioned in its Jurisdictional Statement) and in connection there-

5. *Benefits of Lifetime Job Security for Employees*

In the First Report the Commission had noted the "adverse effects on carrier employees" as one of two reasons for denying approval (App. 166-167).[53] In view of subsequent agreements between the applicants and labor organizations, and conditions imposed in the order of approval to require the benefits thereof to be made available for all employees, in the Second Report the Commission found that "the protection thereby afforded, providing as it does job security as well as monetary benefits, could hardly have been achieved except for the merger" (App. 326).

The agreements and the arrangements to afford the benefits to all employees are described in the Second Report (App. 323-328). As the Commission found: "Under the agreements, 'employees would receive guarantees and job assurances for the rest of their working lives . . .'" (App. 326). Abolishment of thousands of unnecessary jobs, thereby saving expenses, will come through attrition (*i.e.*, principally by death, retirement, discharge for cause or resignation), thus giving the employees the lifetime job

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with questions the validity of the revised estimates of savings (D.J.Br. 58-59, n. 45). Both of these points were fully argued before the District Court which found them to be without merit (App. 39-42; see pages 82-91 of applicants' brief to District Court). So far as concerns the question of discovery it should be noted that the applicants made available to the Department voluminous files and working papers relating to the evidence on merger savings. As shown by affidavits filed with the Commission certain additional requests by the Department were for records of a kind that either never existed or had long since been destroyed in accordance with the Commission's rules relating to the preservation of records.

[53] "In that [First] report, the finding that 'substantial' hardship would be inflicted upon employees as a result of merger was a significant factor in the decision to deny these applications" (App. 323-324).

security mentioned above. The Commission said (App. 327; see also App. 468):

> "We believe that the effect of attrition protection for all employees of the merged system will tend toward greater efficiency and higher morale among the employees and will thereby promote the national transportation policy in the development and maintenance of an adequate and effective transportation system."

These benefits, however, take effect only if and when the merger takes effect. Thus counsel for Railway Labor Executives' Association, comprising the labor organizations representing virtually all of applicants' employees, appeared specially at the hearing on preliminary injunction in the District Court to call the court's attention to the fact "that the benefits to the employees secured under these agreements—and they are substantial—will not be realized unless and until the merger is consummated."[54]

B. The Conditions Imposed by the Commission for the Milwaukee and Other Railroads Will Enhance Existing Competition, Create New Rail Competition and Benefit Shippers.

In addition to the benefits described above, this merger will produce important advantages for other railroads and their shipping public. These additional benefits will result from the many conditions imposed by the Commission in the order of approval, pursuant to its authority under Section 5(2)(b) of the Interstate Commerce Act.

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[54] (Transcript of May 15, 1968, p. 92). Affidavits of G. E. Leighty, Chairman of RLEA, and C. L. Dennis, International President of the Brotherhood of Railway and Airline Clerks, were filed with this Court on May 14, 1968 as attachments to the Supplemental Memorandum of Railroad Respondents in Opposition to Application for Stay.

The conditions will enhance the existing competition from railroads that are now competing with the Northern Lines and also will create rail competition on a large volume of traffic for which shippers today have no choice between or among railroads. They demonstrate, too, the Commission's careful attention to the factor of competition. Numerous shippers at the initial hearing urged adoption of the conditions sought by the Milwaukee and the North Western and several federal and state intervenors which originally had opposed the merger either withdrew opposition or affirmatively supported the merger after the applicants expressed willingness to accept the conditions (App. 268). The Commission described the general effect of the conditions as follows (App. 334):

> "We believe that the overall effect of the conditions imposed here will portend for a strong degree of intramodal rail competition in the affected territory, promote the effective development of improved transportation services to the shipping and receiving public, and comport generally with the purposes and objectives of the national transportation policy as declared in the act."

1. *Conditions Imposed for the Milwaukee*

The Commission in both the First and Second Reports found that because of the imposed conditions the Milwaukee will be "a stronger carrier after [this] merger than it is today" (App. 119, 322-323, 331). In the words of Commissioners who dissented from the First Report and joined in the Second Report: "An improved, ratemaking Milwaukee could provide competition of an intensity not heretofore seen in the territory" (App. 176).

The Milwaukee, which has the shortest route between Chicago and Seattle, is a substantial and active competitor for traffic to, from and within the northern tier. The vigor

and effect of its competitive activities are demonstrated by the fact that it was the Milwaukee, prompted by truck competition, that initiated faster train schedules beween Chicago and Seattle—a "competitive effort" to which the Northern Lines responded by taking similar action (D.J. Br. 59; *cf.* App. 82; see p. 44, above). The Milwaukee, however, has been handicapped by limitations that restrict its competitive ability.[55] These historic limitations on the scope and extent of competition from the Milwaukee will be removed by the Commission's conditions to this merger. As the Commission found (App. 331):

> "The effect of the Milwaukee and North Western conditions would be to strengthen the Milwaukee—

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[55] Those handicaps were described by the Commission in part as follows (App. 108-109, 111-112):

> "Since Milwaukee's lines do not reach Portland or Bieber, the Milwaukee has no direct connection with Southern Pacific or with Western Pacific. Since applicants and Union Pacific do not participate in through routes and joint rates with each other or with Milwaukee at junctions which provide them with less than a maximum haul, Milwaukee cannot participate in alternate transcontinental through routes via junctions west of Twin Cities and the Missouri River gateways to and from all major west coast terminals."
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> "The limitations on Milwaukee's routes west of Twin Cities and Sioux City, together with the fact that Milwaukee is short hauled at the Twin Cities gateway on a large volume of traffic has severely limited Milwaukee's traffic potential, and has impaired its competitive position in relation to applicant railroads."

A major limitation hampering Milwaukee's competitive ability and restricting its revenues in the Pacific Northwest is the fact that it cannot "participate in north-and-south traffic between major west coast cities" (App. 109). Neither can it reach Billings, Montana, which has become one of the two largest cities in that state.

> both as to revenue potential and competitive posture. Milwaukee would receive all of the benefits that it has requested, including access to Billings, and North Western would also receive all the major benefits requested. Applicants have also accepted a condition which would require NuCo [the merged company] to 'improve and expedite interchange of freight with the Milwaukee at the Twin Cities.'"

The Department concedes that "the Milwaukee would be stronger in absolute terms" and also says: "That the protective conditions imposed would benefit the Milwaukee is self-evident" (D.J.Br. 51, 52). Its argument that the Milwaukee conditions do not constitute "a significant affirmative benefit that could justify the merger" (p. 54) obscures the scope and importance of the conditions and ignores the fact that this benefit, important in itself, is accompanied by the numerous other benefits that the merger will produce. After pointing out the significance of the Milwaukee conditions and reviewing the Department's contentions, the District Court stated (App. 31):

> "The evidence gives substantial support to the conclusion of enhanced competition by Milwaukee, with traffic diversions to it from the merged lines. The Commission's reliance upon this factor in reaching its conclusion that the merger was in the public interest must be accepted as valid, even though the merged lines will have a larger market share than Milwaukee. Milwaukee, by no means a negligible competitor previously, will become for the first time a much strengthened competitor, realistically vying for long haul traffic at every major point served by Northern Lines."

(a) *Creation of Rail Competition by Opening Eleven Gateways for the Milwaukee in Northern Tier States*

At present a large volume of traffic is handled for long hauls in the northern tier states without any rail competi-

tion whatsoever for those hauls. This is true of traffic originating or terminating at the large number of stations that are served by one of the applicants and by no other road. Most of the applicants' stations in the northern tier states of Montana, North Dakota and Washington fall in this category.[56]

For example, on a shipment to Chicago from Gleed, Washington (Tr. 8630), there is no rail competition today for any part of the long haul across the northern tier to the Twin Cities. Northern Pacific is the only railroad at Gleed; it hauls the shipment for the short distance to Spokane and then retains it until it reaches the Twin Cities. The Milwaukee, Great Northern and the Union Pacific system all serve Spokane but they cannot compete for the long haul of that shipment from Spokane east because Northern Pacific declines to short haul itself by joining with them in a through rate from Gleed to Twin Cities or Chicago. The shipper cannot route the shipment at the same rate on any other railroad than Northern Pacific, except for the haul from the Twin Cities to Chicago.

The same situation applies on westbound shipments from Chicago or other points to the many hundreds of points in the northern tier that are served exclusively by Northern Pacific. If Milwaukee originates a shipment east of Twin Cities and destined to one of those western localities, it must give up the shipment to Northern Pacific at Twin Cities rather than at a junction near the destination. Great Northern and the Milwaukee follow the same historic practice in protecting their own long hauls against rail competition on shipments to or from the points where one

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[56] In Montana 495 or 86 percent of applicants' 573 stations are served by one applicant exclusively. In North Dakota and Washington the respective percentages are 89 and 69 (Ex. 16, p. 2).

of them is the only railroad. The shippers today have no choice between railroads for this long haul of shipments on which one railroad is the only railroad at origin or destination in the Northwest. (See App. 121, 840).

Under Condition 23 to the Commission's order approving this merger, consummation of the merger will create rail competition for these long hauls. This condition will open to the Milwaukee gateways at eleven points in the northern tier at Linton and Fargo, North Dakota; Miles City, Judith Gap, Great Falls, Bozeman, Butte and Missoula, Montana; and Spokane, Seattle and Tacoma, Washington (Condition 23, App. 449; amended, at Milwaukee's request, App. 493). These gateways and the territories that can be served through them are shown on the map in Appendix A to this brief. With respect to the example of the shipment from Gleed mentioned above, Milwaukee will be competing with the merged company for the long haul from Spokane to the Twin Cities. The Spokane gateway will be open; the shipper at Gleed will be able to route the shipment so that the merged company must give up the shipment to the Milwaukee after hauling it only from Gleed to Spokane (Tr. 8630).

Wholly new rail competition will be created on a large volume of traffic and new routes will be opened for shippers. A $97 million annual pool of traffic would be made subject to Milwaukee solicitation for routing through the new gateways (App. 880). The Commission stated, regarding Condition 23 (App. 121-122):

> "Thus, it would permit Milwaukee to solicit for its longest practical haul over its lines west of Twin Cities or Sioux City traffic which must now be surrendered or received at those points. Correspondingly, New

Company would have the same opportunity. The condition would also permit shippers to select alternate routes, according to their needs, over the lines of the Milwaukee and the New Company. In addition, shippers and receivers using Milwaukee would gain the advantage of diversion and reconsignment, stop-off and transit privileges available to shippers and receivers using the New Company."[57]

The importance of the opening of these gateways to create wholly new competition is exemplified in the position taken by the United States Department of Agriculture which is the nation's largest shipper of agricultural products:

"The Secretary's position in regard to the proposed merger has been that considerable benefit could accrue to the agricultural community provided certain conditions were imposed that would open gateways to competing railroads thus creating more vigorous competition . . . If these conditions [later adopted in the order] were to be imposed by the Commission, we

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[57] In its Third Report on Reconsideration (on its own motion) the Commission, in construing Condition 23 broadly, stated (App. 500, 503):

"Condition 23, and other prescribed conditions to our approval of the merger, embody our purpose to create a strong degree of meaningful intramodal competition not now possible in the affected territory and to promote improvement in transportation services to the shipping and receiving public. 331 I.C.C. 283 and 289. It is clear from our report on reconsideration and further hearing that the elimination of intercarrier routing barriers and the strengthening of Milwaukee were *sine qua non* elements in our approval of the merger.

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"The availability of alternate competitive routes via Milwaukee will, in fact, be a deterrent against competitive lethargy on the part of the merged company."

believe that additional benefits would be furnished to agriculture and the public."[58]

The "intercarrier routing barriers" (App. 500) that exist today and prevent rail competition on the great volume of agricultural and other products of the Northwest will be broken. Milwaukee will no longer be confined to the handling of traffic for the long haul only on shipments that originate or terminate on its own lines in the northern tier states. It will be competing for the long haul on traffic originating or terminating on the lines of the merged company in the large tributary areas for the respective new gateways. New rail competition of large scope will be created.[59]

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[58] Department of Agriculture reply to applicants' petition for reconsideration, filed October 24, 1966, pp. 1, 2. The Commission's motion to affirm herein states at page 26: "Indeed, in June of 1968, the then Undersecretary of Agriculture wrote to the then Attorney General Clark, reiterating the Department's position, concluding 'We do not object to the merger inasmuch as it will result in benefits to agriculture.'"

[59] The Department of Justice suggests that the Commission might open the eleven gateways by an exercise of its power to establish through routes among carriers under Sections 1(4), 3(4), and 15(3) and (4) of the Interstate Commerce Act (D.J.Br. 54-55, n. 40). This suggestion disregards Milwaukee's own recent experience. Section 15(4) forbids the Commission to compel a carrier to short-haul itself unless the Commission finds that a through route "is needed in order to provide adequate, and more efficient or more economic transportation." As a result of this provision the Milwaukee, even though supported by the Secretary of Agriculture and various shipper groups, failed in a protracted proceeding to obtain an order requiring the Northern Lines to open a gateway at Spokane, one of the eleven points at which gateways will be opened by this merger. *Chicago, Milwaukee, St. P. & P. R. Co.* v. *Spokane, P. & S. Ry. Co.*, 300 I.C.C. 453, 471-498 (1957), sustained *sub nom. Chicago, Milwaukee, St. P. & P. R. Co.* v. *United States*, 182 F. Supp. 81, 84, 90 (1960), affirmed in

(b) *Extension of Milwaukee Line to Allow it to Serve Portland and Compete for Transcontinental and Other Traffic*

Milwaukee's lines from Chicago to the Pacific Northwest and from the Canadian border and Seattle southward end at Longview Junction, Washington, 47 miles north of Portland (App. 27-28, 888). This historic handicap on the Milwaukee and its shippers will be removed by one of the most important conditions imposed on this merger. Under Condition 24(a), Milwaukee will obtain trackage rights from the merged company to extend its line from Longview Junction to Portland (App. 450).[60]

Chicago, M., St. P. & P. R. Co. v. *United States*, 366 U.S. 745, 749.

The Department errs in saying that the evidence in the present proceeding "would go far to justify" an order under Section 15(3) and (4) opening the eleven gateways. In the Spokane gateway case the Commission found (and its findings were sustained by the courts) that evidence comparable to the evidence here was not sufficient to justify an order that would require the Northern Lines to short-haul themselves. Moreover, the Department's comment on this point ignores the fact that in any proceeding under Section 15(3) and (4) the Commission would have to take evidence and make findings on a myriad of particular commodities, particular gateways, particular routes, and the particular market or other economic conditions applicable to those commodities, gateways and routes. By contrast the conditions the Commission has imposed on the present merger will open, immediately upon merger, eleven gateways for all commodities.

The Commission was aware of the limited extent of its powers under Section 15(3) and (4); in the First Report the dissenting commissioners specifically referred to this matter (App. 187-188).

[60] Except as a condition to merger or other transaction under Section 5(2) of the Interstate Commerce Act, the granting of trackage rights cannot be required. As the Commission said in *City of Hialeah, Fla.* v. *Florida East Coast Ry. Co.*, 317 I.C.C. 34, 36 (1962), "it has consistently been held that this Commission is without power to compel a carrier to grant trackage rights over its lines to another carrier. . . ."

Portland is now served by Union Pacific, the Northern Lines and their jointly-owned subsidiary (SP&S) and Southern Pacific. Any Milwaukee shipments to Portland or to points farther south in Oregon or California must be interchanged with Union Pacific or Northern Lines to complete the haul to Portland. After noting that Milwaukee's inability to serve Portland and to connect with Southern Pacific deprives Milwaukee of much transcontinental traffic and prevents it from participating "in north-and-south traffic between major west coast cities" (App. 108-109), the Commission further described the effects of this severe Milwaukee handicap (App. 111-112):

> "Because Milwaukee is unable to participate in transcontinental routes over its long haul route west of Twin Cities to and from Oregon and California on volume movements, it must hold traffic originating or terminating at points local to its lines, to its own long haul and does not participate in transcontinental routes via Portland, Bieber or other California gateways."
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> "Moreover, Milwaukee must obtain the concurrence of Great Northern, Northern Pacific or Union Pacific as an intermediate carrier to establish joint rates to or from all points served by Milwaukee west of Twin Cities on the one hand, and, on the other, Vancouver, Wash., Portland and points south, which handicaps Milwaukee in obtaining traffic to move over its lines."
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> "Numerous shippers have indicated that the rate and service limitations on Milwaukee routes have prevented them from making full use of the latter's service potential, to their detriment as well as the Milwaukee's."[61]

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[61] The service difficulties on the little traffic now handled by Milwaukee to or from Portland were indicated by the Examiner: "Because of competitive schedules maintained by Union Pacific between Spokane and Portland through Marengo and by Milwaukee for its

By obtaining the ability to provide one-line direct service to and from Portland, Milwaukee will be enhancing competition both by the marked improvement in its service and by becoming a ratemaking line, able to establish competitive rates without concurrence of connecting competitor lines (App. 887):

> "Imposition of the requested condition would enable Milwaukee to participate as a single-line carrier between all points on its lines north and east of Longview, on the one hand, and, on the other, Portland, Kalama and other intermediate points, with the same ability to provide faster service and through rates as New Company. There would be also available an alternate transcontinental route, competitive with New Company, between Chicago, Portland and intermediate points, and Milwaukee would be enabled to establish rates independently of its competitors to and from such points as Portland and Vancouver. Likewise, Milwaukee would be enabled to negotiate rates with connecting lines at Portland to, from and via Oregon and California, broaden the market and transit points for shippers and receivers on its lines and the lines serving Oregon and California; would permit transit and stops to complete loading or part unload at all Milwaukee points north and east of Portland on traffic originating south thereof moving over Milwaukee. In the reverse direction, there would be transit and stops in Oregon and California for traffic originating on Milwaukee moving

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east-west trains via Marengo, cars interchanged at that junction are delayed approximately 24 hours" (App. 842). Similarly, regarding Milwaukee's interchange of Portland shipments at Chehalis, Washington, a shipper of paper and paper products testified: "Time in transit via interchange at Chehalis limits its competitive opportunities, and Milwaukee's opportunity to solicit traffic south of Seattle" (App. 891). Details of Milwaukee's handicaps due to its inability to reach Portland and of the benefits to shippers of the Portland condition herein were stated (App. 840-845, 886-893).

to points south of Portland or south and east of Portland via California gateways."[62]

As the Commission found, "even a North Western-Milwaukee merger will not result in a transcontinental service; only the opening up of Portland to Milwaukee will accomplish that" (App. 323).

(c) *Trackage Rights for 102.7 Miles in Washington to Enable Milwaukee to Operate Fast North-South Service*

At present, competition by Milwaukee for Pacific Coast north-south traffic and its ability to provide adequate service are limited not only by its lack of access to Portland but also by its poor service route from the Canadian border south in Washington. "Due to frequent interchanges with railroads north of Portland, service is often inadequate to attract traffic for movement over Milwaukee, except for traffic from points local to Milwaukee" (App. 111). Milwaukee handles traffic from Sumas (the border point) to Bellingham; interchanges the cars there with Great Northern for a haul to Everett; receives the cars again at Everett and handles them to Chehalis; and interchanges them there with Union Pacific or the Northern Lines for the rest of the haul to Portland (App. 897-898). Thus, "Traffic to and from British Columbia via Sumas generally requires

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[62] Union Pacific, which will be competing against Milwaukee and Northern Lines for transcontinental traffic to or from Portland, strongly objected to the Portland condition since Milwaukee's competition will divert part of Union Pacific's traffic to the Milwaukee. Finding in the Second Report that Union Pacific still will be able "to provide adequate service in its territory," the Commission overruled Union Pacific's protest (App. 333). In the report on further reconsideration, the Commission again overruled Union Pacific's objection and stated, in part, that "The condition is designed to strengthen competition against the merged system . . ." (App. 469).

a three- or four-line haul" (App. 111). "The resulting service is slow . . ." (App. 898).

Upon consummation of the merger, Condition 24(b) and the Portland condition described above will enable Milwaukee to provide fast one-line direct north-south service (App. 311, 450-451). By obtaining trackage rights from the merged company over lines between Renton and Snohomish and between Everett and Bellingham, the Milwaukee will be able to offer single-line service all the way through Washington from the Canadian railroad connection at Sumas down to Portland. The Province of British Columbia, which intervened to "support the merger" (Tr. 13224), supported this strengthening of Milwaukee's competitive ability (Tr. 13233) as did numerous shippers "seeking improved and competitive service" (App. 900). As the Examiner concluded (App. 900):

> "The strengthening of Milwaukee in the considered area by condition 3 [Condition 24(b) in the report on reconsideration] will contribute much to the improvement of railroad service in the area and should be of inestimable benefit to shippers and receivers."

(d) *Extension of Milwaukee Service to Billings, Montana*

When Milwaukee built west, Billings was quite small and Milwaukee bypassed it (App. 901). In later years Billings has become one of the two largest cities in Montana. (Milwaukee serves the other one, Great Falls.) Rail competition at Billings is now limited by the fact that it is located on Northern Pacific's main line and is at the end of a long secondary Great Northern line (see Appendix A to this brief). The Commission has imposed Condition 24(c) (App. 451) sought by Milwaukee to extend its service to Billings, enabling Milwaukee to establish competitive rates to or

from that city without necessity for concurrence by the Northern Lines. In so doing, the Commission stated in the Second Report that "Milwaukee would receive all of the benefits that it has requested, including access to Billings . . ." and that the effect of the Milwaukee conditions "would be to strengthen the Milwaukee—both as to revenue potential and competitive posture" (App. 331).

(e) *Increase Both in Milwaukee's Competitive Strength and in its Earnings*

As shown above, the conditions imposed on this merger will in one stroke eliminate the existing handicaps on the Milwaukee, enabling it to provide greater competition with the Northern Lines and other competitors and better service to the public. The Department expressly concedes that the Milwaukee will be stronger following the merger and will be benefited by the conditions (see p. 66, above), although it also asserts that the Milwaukee will be "relatively weaker than it is today" (D.J.Br. 51). The Commission in the Second Report expressly found the Milwaukee's "competitive posture will be enhanced" (App. 323). This finding is fully supported by the evidence which shows that the merger conditions will make Milwaukee a significantly stronger competitor which will have access to routes, territories and traffic heretofore denied it, will for the first time be in a position to establish independent transcontinental through rates, and will divert from the merged company more traffic than it will lose to that company.

The Department also concedes that the merger, as conditioned, will increase Milwaukee's revenue potential (D.J.Br. 53-54).[63] Even on the Department's calculations, the merger

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[63] The Commission found: "Denial of the applications for the purpose of preserving competition between the Northern Lines would merely perpetuate the existing dominance of the GN and

will increase Milwaukee's revenues by $12.8 million a year, net after deduction for estimated diversions from Milwaukee to the merged company (D.J.Br. 53). The amount thus calculated by the Department for Milwaukee's gains in the Northwest would amount to more than a 5 percent increase on *all* of Milwaukee's gross revenues for the year 1965, including the revenues not only from Milwaukee's presently underutilized lines in the Northwest but also from its large Midwestern operations. Moreover, the added revenues will be from incremental traffic and therefore, since railroads have relatively high fixed costs, a large proportion of the gain will flow through to net income. That increase in net income will be clearly significant; Milwaukee's net income was $1.3 million, $5.3 million and $7.3 million in 1960, 1964 and 1965, respectively (App. 105). Such a result—from a merger that will provide better service to the public and make Milwaukee a competitor for the first time on vast quantities of traffic—is an important factor in the public interest.

2. *Conditions Imposed for North Western and Other Roads*

Conditions imposed for the North Western and certain other rail competitors of the applicants also will increase competition and provide public benefits.

(a) *New Gateways with North Western*

In addition to the eleven gateways that will be opened with Milwaukee to create wholly new competition on hauls

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NP in the northern tier, with the Milwaukee, despite shorter routes and superior grades, left to its comparatively small share of the market. Preservation of the competitive *status quo* would, in our view, relegate the Milwaukee to an increasingly marginal and deteriorating role" (App. 321).

that are now non-rail-competitive, two gateways of similar nature will be opened between the merged company and the North Western. One is at Crawford, Nebraska, and the other at Oakes, North Dakota (App. 329-330, n. 20; 452, Conditions 26(1)(a) and (b)).

Opening of the Crawford gateway will permit North Western to compete against the merged company for longer hauls on transcontinental and other shipments. On eastbound shipments, for instance, moving via the junction point at Laurel, Montana, to the midwest or beyond, North Western will be able to obtain the shipments at Crawford. It will thereby short haul the merged company for the 486 mile haul to Omaha which is the present first point where North Western can compete.

The Oakes gateway also will make it possible for North Western to compete for longer hauls than it can now obtain. Under separate operation of the applicants, North Western can now obtain eastbound traffic from the Northern Lines at the Twin Cities or Sioux City and must deliver westbound traffic in interchange there. The new gateway at Oakes would be 355 miles west of Twin Cities, and North Western, after this merger, will be competing for those hauls. Under both of these gateway conditions, competition will be increased.

(b) *Improved Interchange Aiding Competition and Service by North Western at Minneapolis and Head-of-the-Lakes*

Two operating conditions were imposed that will aid North Western competitively and also benefit its shippers (App. 329-330, n.20; 453-454, Conditions 27, 30). One "dealing with improved interchange relations between C&NW and New Company at Minneapolis is considered by C&NW the most important in terms of potential reductions in time

and expense" (App. 939). The other is desired by North Western to aid it in expediting traffic interchanged by it at Head-of-the-Lakes (Duluth-Superior) with another road, Duluth, Winnipeg and Pacific Ry. Co. As the Commission found: "The requested condition would enable the North Western to compete on more equal terms with the New Company" (App. 104).

(c) *New Gateway at Klamath Falls, Oregon, to Improve Service and Increase Competition on North-South Traffic*

For the north-south traffic on the Pacific Coast there are two principal routes, one via connection with Southern Pacific at Portland and the other (known as the inside route) via the connection between Great Northern and Western Pacific at Bieber, in the far northeastern part of California. Great Northern connects with Southern Pacific at Chemult, Oregon, and (farther south) at Klamath Falls, Oregon. The gateway at Chemult is open for traffic only to certain points east of the Cascade Mountains reached via Great Northern, but Great Northern has not opened the gateway at Klamath Falls except to or from limited points (Tr. 4765-66; App. 818), and the "route via Chemult has not been a competitive route, service-wise" (App. 821). Under the conditions worked out by stipulation and imposed in the order, a new gateway at Klamath Falls will be opened after merger for all traffic, both east and west of the Cascades, to and from points on the present Great Northern and Northern Pacific and their short line connections (App. 331-333, 439-440, Condition 7, 819-823). Together with other trackage right and gateway conditions, these conditions "will produce service advantages in the handling of the shipments and will provide more competition on the north-south traffic" (App. 827). After summar-

izing the circumstances relating to the stipulated conditions the Commission found in the report on reconsideration (App. 332-333):

> "In our opinion, these stipulations are indeed in the public interest and should be approved. The combination of the equalization of opportunities through the Bieber and Klamath Falls (or Chemult or Portland) gateways and the Milwaukee's Portland and Sumas route (trackage rights) conditions, should aid the establishment of genuine rail competition on the Pacific Coast, to the great benefit of the shipping and consuming public."

(d) *Provision for Soo Line to Compete for Additional Traffic*

One of the competitors of the applicants is the Soo Line, a subsidiary of Canadian Pacific whose route has previously been described (pp. 6-7, above).

Conditions described in the Second Report that give the Soo Line trackage rights and other benefits will intensify competition against the applicants and will make it possible for that road to start competing for certain traffic to which it does not now have access (App. 446-447, Condition 21). As the Examiner found, the various Soo Line conditions "would enable it to . . . remain a strong and active competitor in the territory it serves . . . Moreover, it would open up the ability of Soo to serve certain shippers between Lignite [N. Dak.] and Crosby, Minn., and between Bemidji and Schley, Minn., to which it does not now have access. Competition would be intensified" (App. 830; Tr. 10227-29, 10239). The president of the Soo Line testified to the competition in part as follows (Tr. 10249-50):

> "It is important to the railroads of this area and to the railroads generally to keep business on the rails. If, through stronger companies, we can compete as an

industry more effectively and keep business on the rails, that is going to help the Soo Line. If the merged company is successful in keeping business on the rails and with the Twin Cities Gateway open, we have a chance of getting business which otherwise might be moving on another mode of transportation, even though we will have to compete with the merged company in its solicitation and handling.

* * *

"Bear in mind that the Soo Line is not an advocate of the status quo, and we don't intend to stagnate under this merger, we are going to be out competing and working for traffic against this line every day of the week and maybe a little competition like that will be good for all the railroads."

C. Other Railroads Will Actively Compete With the Merged Company for Almost All of Applicants' Traffic That Is Now Rail Competitive.

The pressures of rail competition will continue after the merger with respect to almost all of the traffic that is today competitive between the applicant railroads. The rail competition against the merged company will come from the strengthened Milwaukee and from the Union Pacific, Soo Line, Canadian Pacific, North Western, Southern Pacific and other roads.

No more than 6 percent of applicants' revenues from traffic that originates or terminates in the northern tier of states is from shipments handled at localities where existing rail competition will be entirely eliminated by the merger (App. 316). The other 94 percent of those northern tier revenues is from shipments which are not competitive between the merging roads or on which rail competition with other roads will continue after the merger.

In the Second Report, as we shall show, the Commission took into consideration the fact that the percentage statis-

tics mentioned in the First Report and reiterated by the Department (D.J.Br. 7, 9, 42) overstate the proportion of applicants' traffic that is competitive between them. Those percentages include a large volume of non-competitive shipments such as those from points served by only one of the two Northern Lines to their common terminals at the Twin Cities or at Seattle. The Commission found that "as to many communities and shippers in the area involved, the lines of GN and NP are not in fact competitive with each other" (App. 315-316).[64]

1. *The Merger Will Eliminate All Rail Competition at Only a Relatively Few Communities and on a Small Amount of Traffic.*

After this merger, rail competition will continue at virtually all localities where it now exists. The Commission's findings on this point deal with both the northern tier, considered separately, and the entire system of the merging roads.

Regarding the northern tier, the Commission found that applicants' stations at the scattered localities now served by both Great Northern and Northern Pacific and by no other railroad comprise 4.25 percent of applicants' total stations in the northern tier (App. 316; Column A of table of data for "Class I" stations).[65] For the test year,

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[64] The extensive traffic in the northern tier on which no rail competition exists today, and the numerous new gateways to be established upon merger which will create rail competition for that traffic, are described at pages 66-70, above.

[65] "[T]here is in evidence [Ex. 15] an inventory of every station on the proposed merged system by states served with a description of all other transport modes available at these stations identifying each railroad, motor carrier and air line, and showing the population at each such station" (App. 769-770).

1960, those stations accounted for only 6.6 percent of applicants' cars in the northern tier, 5.6 percent of the tons and 6.16 percent of the revenues (App. 316).[66] The similar findings in regard to applicants' entire system rather than just the northern tier show that the stations where existing rail competition will be entirely eliminated comprise only 3.15 percent of the total stations and account for only 4.20, 3.61 and 4.51 percent of applicants' total cars, tons and revenues, respectively (App. 316).[67]

The Commission in the Second Report considered not only the small number of these stations and their minimal amount of traffic but also the fact that the figures as to that small amount of traffic actually overstate the loss of competition at those stations (App. 317):

"The number of stations at which rail competition would be eliminated entirely is small, and these sta-

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[66] These numbers and percentages would be even smaller if computed to give effect to Condition 24(c) (App. 451) which gives Milwaukee access to Billings, Montana and, therefore, removes Billings from the group of communities where rail competition will be eliminated (see pp. 75-76, above).

[67] The Department evidently seeks to create an impression that the Second Report ignored the northern tier data stated in the First Report and that the Second Report "focuses" on the system-wide data in lieu thereof (D.J.Br. 12-13, 39). What the Second Report actually did was to consider both types of comparison (App. 316-317). The Department also errs in saying that the figures cited in the Second Report ignore the "amount of *traffic*" on which competition would be lost and "concentrate simply upon the number of *points* on the combined lines where competition would not be reduced" (D.J.Br. 39; italics by the Department). The Second Report in fact considered both the amounts of traffic on which competition would be lost or diminished and the number of points where rail competition would be either eliminated or diminished, and the amounts of traffic and number of points that would not be affected with respect to competition (App. 316-318).

tions do not produce any great volume of applicants' business. Moreover, some of these stations are located on the main line of one applicant and on the branch line of another, with the result that loss of competition is more theoretical than real."[68]

There is another reason why the statistics as to the small amount of traffic handled at these stations overstate the amount of competition on that traffic. Shipments from these common points to the many points that are served by only one of the Northern Lines are necessarily noncompetitive.

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[68] The findings in the Examiner's Report give further details including the following (App. 772-773):

"Pasco, the largest Washington community in this small group of 47 communities, has a population of 14,522. While Pasco is now served by Northern Pacific and SP&S [an NP and GN jointly owned subsidiary] the only competitive traffic between applicant lines at that point is confined to that which moves between Pasco and Spokane. The other Washington points in the group of 47 have a total population of 4,228.

"Except for Grand Forks (population 34,451) the ten North Dakota communities in that group of 47 communities have a total population of only 8,321. Grand Forks is served by Great Northern and Northern Pacific.

"The Minnesota communities in the group of 47 communities range from no recorded population to only four over 10,000, namely Anoka (10,562), Fergus Falls (13,733), Moorhead (22,934) and St. Cloud (33,815).

"Turning now to those of the 47 communities in Montana where the largest is Billings (52,851) [by reason of the Milwaukee conditions Billings no longer is in this group] and two of the others are the adjacent points of East Billings and Laurel (4,601). Helena (20,227) is served exclusively by Northern Pacific and Great Northern, although the former enjoys a decisive competitive advantage since Helena is on its main line whereas it is near the end of a branch line of Great Northern. The other Montana communities in the group of 47 referred to above have a total population of 5,409."

and so are the incoming shipments from points that are served by only one of the Northern Lines.[69]

This case thus does not present the monopoly problem that confronted the Commission and the courts in the case of the recently consummated Seaboard-Coast Line merger.[70] There the Commission's determination that the merger was consistent with the public interest was sustained even though it creates a monopoly in both the central and western parts of Florida (259 F. Supp. at 1005). Cities of large size, such as Tampa, Orlando, Fort Myers and St. Petersburg, are located in that area. Tampa alone had a population of 275,000 in 1960; after the merger it is served by only one railroad. The weak Florida East Coast Ry. Co. provides the only rail competition against that merged company at Miami and in eastern Florida.[71]

In its discussion of the *Seaboard-Coast Line* case the Department makes generalized references to intermodal competition which seem designed to suggest that such competition existed in those parts of Florida where the merger eliminated all rail competition (D.J.Br. 21, 29, n. 16). This is not borne out by the facts. In that case the District Court,

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[69] Details as to the many localities that are served by only one of the applicant lines, with or without another railroad, are at pages 87, 88, 90-92, below.

[70] *Seaboard Air Line R. Co.—Merger—Atlantic Coast Line R. Co.*, 320 I.C.C. 122 (1963), sustained *sub. nom. Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla. 1966), aff'd *per curiam* 386 U.S. 544.

[71] Referring to the Northern Lines' "prosperity" in its effort to distinguish *Seaboard-Coast Line* (D.J.Br. 21), the Department overlooks the fact that "the past earnings record of both Seaboard and Coast Line is impressive" (320 I.C.C. at 149) and that those roads were earning a rate of return *above* the national railroad norm whereas the rate earned by the applicants here is *below* that norm (see pp. 53-55, above).

having noted that the monopoly "will have its greatest impact" in certain areas in Florida, referred to the traffic in bulk commodities originating in those areas and stated "Nor does the record show that effective competition for this type of carriage presently exists in Florida" (259 F. Supp. at 1006, n. 30). While the record did not show what part of the merging companies' revenues or profits were generated by the carriage of these products originating in Florida it did show that nine of the bulk commodities accounted for approximately 75 percent to 77 percent of the total business of the merging railroads (*ibid*).[72]

In sharp contrast to that Seaboard-Coast Line situation, no monopoly area will be created by the Northern Lines merger; rail competition will continue to exist where it now exists at every town or city in excess of 35,000 population and at all but four in excess of 14,000 population.

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[72] The Department also compares the competitive effects in the area of greatest impact here (northern tier) with the systemwide effects in *Seaboard-Coast Line* rather than with Florida where that merger has its greatest impact. Moreover, in this comparison the Department overlooks Union Pacific and other roads when it says that "The Northern Lines' only rail competition in the Northern Tier comes from the relatively weak Milwaukee" (D.J.Br. 21). Union Pacific, an unquestionably strong road, serves Portland and all the major points in Washington and handles more traffic from and to the Pacific Northwest than does Milwaukee (pp. 94-95, below). It should be noted that the Department's reference (D.J.Br. 29, n. 16) to the Southern Railway in its discussion of the competition remaining after the Seaboard-Coast Line merger may be unintentionally misleading; the Southern did not operate in the areas in Florida where the merger eliminated competition between the applicants. The Commission found that the Seaboard-Coast Line would have 81% of the railway mileage in Florida and that in both a six and an eight state area that merged company would have more than 54% of the total rail mileage while Southern, its nearest competitor, would have about 34% (320 I.C.C. at 163).

2. *After the Merger Other Railroads Will Provide Competition for Substantially All of the Traffic Now Competitive Between Great Northern and Northern Pacific.*

At all localities other than the few described above, there either is no competition between the merging carriers or, where those carriers are in competition with each other, active rail competition will continue after the merger.

Most of the applicants' stations in the northern tier and elsewhere are at localities where the merging roads are not now in competition with each other. Those numerous localities are either served by only one of the applicant railroads and by no other railroad (referred to in the evidence as Class III stations) or are served by only one of the applicants and also by one or more other railroads (Class IV stations).[73] The shippers and receivers at Class III and IV stations either have no choice of railroads today or, where they have a choice, they will continue to have exactly the same choice. This large category of traffic, noncompetitive between Great Northern and Northern Pacific, includes two-thirds of all of the tonnage originated or terminated by the merging roads in the northern tier states. The Commission stated (App. 317):

"Limited to the northern tier, and exclusive of overhead traffic, 88.28 percent of the Northern Lines sta-

[73] "The Commission classified stations into four classes: I. Stations commonly served by two of the applicant carriers and no other rail carrier; II. Stations commonly served by two of the applicant carriers and at least one nonapplicant carrier; III. Stations served by one applicant only; IV. Stations served by one applicant and one or more other rail lines" (App. 22-23). These stations are sometimes designated by arabic numerals in the proceedings below. The volume of traffic and the number of stations for each class are set out in Exhibit 16.

tions, which accounted for 60.73, 66.59 and 56.13 percent, respectively, of the cars, tons and revenues in those States, would not be directly affected by the merger."[74]

This leaves for consideration the traffic at localities served by both Great Northern and Northern Pacific and also by one or more other railroads (Class II stations). These stations, where rail competition will continue after the merger, include the five major terminals of Great Northern and Northern Pacific (Head-of-the-Lakes, Portland, Seattle, Spokane and Twin Cities). At each of these major terminals, after the merger, at least two other railroads will be actively competing against the merged company (App. 318).

The Commission gave particular attention to the traffic at the Class II stations. It found that 7.47 percent of applicants' stations in the northern tier are Class II stations and the total competitive and noncompetitive traffic handled by applicants there (as originating or terminating carriers) accounts for 32.67, 27.81 and 37.71 percent, respectively, of applicants' total cars, tons and revenues in the northern tier states (App. 316). On the systemwide basis, 5.27 percent of applicants' stations are in this category, accounting for 21 percent of the cars, 17.75 percent of the tons, and 26.9 percent of the revenues (App. 317).

Analyzing the foregoing percentage figures regarding total traffic handled by the Northern Lines at the Class II stations, the Commission in the Second Report pointed out

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[74] The Commission similarly found (App. 317):

"Systemwide for all applicants, there would be no direct competitive impact, no lessening of competition, at 91.58 percent of applicants' stations. These 4,102 stations accounted for 74.91, 78.64 and 68.59 percent, respectively, of applicants' cars, tons and revenues in 1960."

that the degree of rail competition is less than those percentage figures (App. 317-319). For instance, it stated (App. 319):

> "[A]pportionment of traffic between GN, NP and the other roads serving these points is not wholly the result of interplay of competitive forces, but often results from other factors entirely."

And the District Court stated (App. 24):

> "[T]he finding that the allocation of traffic is not wholly the result of competitive forces is another way of saying that the percentage figures pertinent to Class II stations tend to over-emphasize the importance of intramodal competition at these points. This conclusion finds ample support in the record."

The court then summarized and cited portions of the evidence showing that these percentage figures—including the revenue percentage figure that the Department of Justice uses in its brief (p. 7)[75]—overstate the amount of traffic that is competitive between the two Northern Lines at the Class II stations (App. 24-25). The court stated in part that "The factors considered by the Commission are broadly indicative of the weakness of the Department of

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[75] The Department's 43% revenue figure is constructed by adding together the 37.71 percentage for Class II stations in the northern tier and the 6.16 percentage for the Class I stations therein, percentages which include traffic that is noncompetitive between the Northern Lines. In *Seaboard-Coast Line* competition was entirely eliminated on 13.7% of the lines' total tonnage (320 I.C.C. at 164), whereas in this merger competition will be entirely eliminated on no more than 3.61% of the applicants' total tonnage. Similarly, in *Seaboard-Coast Line*, 33% of systemwide total tonnage was competitive between the merging lines (*ibid.*); in this case, the systemwide total tonnage at stations served by more than one applicant is no more than 22% (3.61% at Class I and 17.75% at Class II stations) and much of that tonnage is noncompetitive.

Justice's emphasis on raw statistics" (App. 24). The court observed that shipments to and from the Class II stations, which are included in the traffic figures for those stations, are necessarily noncompetitive between the Northern Lines when those shipments come from or are destined to Class III or IV stations served by only one of those lines. As the District Court further pointed out (App. 24-25):

> "Noncompetitive Class III stations account for 37 percent of applicants' revenues, Ex. 16, p. 3. Since the elimination of competition between the applicants is now the issue, it should be noted that over 90 percent of applicants' stations are Class III or IV. Accordingly, much of the revenue attributed to Class II stations is not subject to competition between the applicants."

The Department argues that even if its percentage overstates the competition existing between the Northern Lines the overstatement is not significant (D.J.Br. 44).[76] But in fact the overstatement is significant, particularly when considered in terms of economic realities. This can be shown by reference to "forest, agricultural and mineral products." These are commodities to which the Department gives particular emphasis in its argument, asserting that they account for "65 percent of Great Northern's carload revenue and 58 percent of that of Northern Pacific"; and that the "long haul transportation of these products is generally not attractive to motor carriers" or susceptible in major degree to water transportation; and that for this reason rail transportation is of "primary importance" in the northern tier (D.J.Br. 7-8). The revenues from applicants' hauls of those products to applicants' eastern termi-

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[76] The Department's attempt to minimize the importance of the overstatement by reference to market competition is discussed at pages 100-102 below.

nals and western points such as Twin Cities and Seattle (on the route of the products to the distant consuming points) are included in the revenue percentage used by the Department in its brief. The record shows, however, that most of the shipments of these products are clearly not competitive between the Northern Lines. They come from origin points served by only one of the Northern Lines either exclusively (Class III stations) or with one or more nonapplicant railroads (Class IV stations).

For example, 89.44 percent of all of applicants' revenues from shipments of Products of Agriculture originating in the northern tier states came from shipments that originated at non-competitive Class III or IV stations. Great Northern and Northern Pacific are not in competition for those shipments because only one of them serves the point of origin. The similar non-competitive percentages for applicants' northern tier revenues from Products of Mines and Products of Forests originated in the northern tier are also high, being 89.61 percent for the mineral products and 74.73 percent for the forest products.[77] For these shipments the shippers have no choice between Great Northern and Northern Pacific. If they ship by rail they must, perforce, use either the one Northern Line that serves the origin or, for Class IV stations, use another railroad that also serves that point. Nevertheless, the revenue percentage figure used in the brief of the Department of Justice includes all the revenues from all of the non-competitive Great Northern or Northern Pacific shipments of agricultural, mineral, forest or other products to the Class II stations in the northern tier. Similarly, that revenue percentage figure includes the revenues from the non-competitive shipments

[77] These percentages for revenue from agricultural, mineral and forest products originated in Washington, Montana, North Dakota and Minnesota are derived from Exhibit 16.

from Class II stations to a destination served by only one of the Northern Lines. Thus the traffic on which applicants are competitive at the Class II stations is considerably less than the total traffic handled by them at those localities but the percentage figures used by the Department represent only the latter.[78]

Since the Class II stations that are major terminals will each be served by at least three railroads and the other Class II localities will have two or more railroads, the spur and incentive of rail competition will continue, after the merger, for the traffic that is now competitive there. The broad scope of that rail competition is indicated by the data in which the Commission described the number of railroads serving each of the five major terminals of the Northern Lines (App. 318).[79]

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[78] The Department says at page 7 of its brief that the applicants "compete also for overhead traffic [*i.e.*, traffic not originating or terminating on their systems] which accounts for an additional 12 percent of their revenues (App. 145)." That figure, however, like the percentage figure for traffic handled at Class II stations, is for the total of that kind of traffic, without separation between shipments which are competitive or non-competitive as between the applicant roads. Moreover, rail competition for overhead traffic will continue after the merger. For example, on shipments from Canadian Pacific or Canadian National origins to California, the merged company (interchanging with Southern Pacific or with Western Pacific) will be in competition with the Milwaukee-Southern Pacific and Union Pacific. On shipments from British Columbia to the East, Midwest or South, there will be competition with the Canadian Pacific-Soo Line route, Milwaukee, Union Pacific, Western Pacific and other roads (see map in Appendix A to this brief).

[79] The names of the railroads and truck lines serving those points are set forth in Exhibit 15, which shows: (a) at the Head-of-the-Lakes (Duluth-Superior, listed by the Commission as "H-L"), there will be six railroads after this merger, including the merged company, Milwaukee, Soo Line and North Western; (b) Portland will be served by the Union Pacific, Southern Pacific, the merged

The Commission recognized that at the Class II stations the shippers will continue to have a choice of railroads but there will be one less rail competitor and to that extent rail competition "will be dimished" (App. 316). It determined, however, that this "competitive impact upon Class II stations is not so significant as to warrant denial of the applications" (App. 318-319). The Commission explained its reasons for this determination mentioning, among other things, the number of railroads that will compete at the Class II stations in the northern tier and at the major terminals elsewhere in applicants' territory, the presence of vigorous intermodal competition, and the imposed conditions that will strengthen the Milwaukee as a meaningful transcontinental competitor and will give many shippers a choice of railroads for the first time. It concluded by stating (App. 319):

> "Here, as in the Seaboard-Atlantic Coast Line merger, we must acknowledge that substantial competition would remain and new competition would be created."

There is ample support in the record for the Commission's determination that the competitive impact of the merger at Class II stations would not be so significant as to warrant denial of the merger application. After the merger the shippers at the Class II stations will continue

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company and, by reason of the conditions, Milwaukee; (c) Seattle will have three railroads—Union Pacific, Milwaukee and the merged company—which also compete at Tacoma; (d) Spokane will be served by Union Pacific, Milwaukee and the merged company; and (e) at the Twin Cities there will be numerous railroads including the merged company, Milwaukee, North Western, Soo Line and Rock Island.

By comparison, the much more heavily populated San Francisco Bay region and Southern California area are each served by three railroads (Tr. 490-491).

to have a choice among competing railroads, and the railroads at those stations will continue to be subject to the incentives and pressures of rail competition and of competition from other modes of transportation. The shippers' support for the merger, to which the Commission specifically referred and accorded weight (App. 320), shows that the Commission had a solid basis for concluding that as a practical matter shippers in the northern tier would not suffer serious adverse effects if the number of competing railroads in that area should be reduced by one. In the light of the whole record, the Commission would not have been justified in regarding the removal of one competing carrier in the northern tier as a valid reason for denying to shippers, to the public, and to the carriers affected, including the Milwaukee, the important benefits that only the merger would bring.

3. *There Is No Merit to the Department's Criticism of the Commission's Evaluation of Competition.*

The Department incorrectly says that "The Northern Lines' only rail competition in the Northern Tier comes from the relatively weak Milwaukee . . ." (D.J.Br. 21). The Milwaukee is indeed one of the principal rail competitors of the Northern Lines. The effectiveness of its competition has already been shown (see pp. 5-6, 64-65, above), and its competitive ability will clearly be enhanced by the conditions imposed on this merger. But Milwaukee is by no means the only rail competitor of the Northern Lines for the traffic that originates or terminates in the northern tier.

Union Pacific, an unquestionably strong railroad, directly competes against the Northern Lines, the Milwaukee and other roads for traffic to or from every one of the Northern Lines' major terminals in the state of Washington (Seattle, Spokane and Tacoma) as well as the major terminal in

Oregon (Portland), the principal point in northern Idaho (Couer d'Alene) and one of the principal points in Montana (Butte). With its one-line service between those major points and Omaha, Nebraska, Council Bluffs, Iowa or Kansas City, Missouri and connecting roads to Chicago, St. Louis and points beyond, Union Pacific is definitely a strong competitor.[80] There is evidence on which the Department itself relies (D.J.Br. 42) that the Union Pacific moves a substantial volume of freight to and from the Pacific Northwest.[81] Union Pacific's competitive interest in the traffic to and from the far Northwest is further demonstrated by its active and persistent opposition to the condition imposed by the Commission herein which will enable Milwaukee to serve Portland (App. 333-334, 469-470).

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[80] The Department's suggestion that the Union Pacific routes are "circuitous" is incorrect (D.J.Br. 45). Between Portland and Chicago, the mileage on the UP-North Western route is 2,266 while the SP&S-NP-Burlington mileage is 2,302. Between Seattle and Chicago, the Milwaukee mileage is 2,181; the NP-Burlington mileage is 2,321; and the UP-North Western route is 2,449 (Official Guide of the Railways, June, 1969).

[81] The Union Pacific's proportion of the "east-west traffic to and from the Pacific Northwest moving through four representative gateways" based on numbers of cars has been consistently larger than that of the Milwaukee and almost as much as either Great Northern or Northern Pacific (App. 145-146). The figures for the years 1957-1960 are set out in the table at App. 146. These figures are derived from publications of the Washington Public Service Commission (Ex. 99, p. 12). That Commission's more recent reports for the years 1967-1968 show that Union Pacific's percentage in each year was 31% while the Great Northern and Northern Pacific percentages ranged from 27.4% to 28.7%.

Since these figures do not reflect origins or destinations they do not indicate how much of the traffic is competitive among the four railroads whose car movements are covered. The figures do not include traffic to and from the Pacific Northwest handled by roads other than Union Pacific, Milwaukee and the Northern Lines.

Moreover, the rail competition for the long hauls to and from the far Northwest is not confined to the railroads discussed above. The map attached as Appendix A to this brief shows the principal routes for transcontinental traffic to and from the Pacific Northwest. The central routes include the Western Pacific between its connection with Great Northern at Bieber, California, and its connection with other roads at Salt Lake City, Utah. The reality of the competition between the central routes and the northern routes is evidenced by Western Pacific's efforts, in conjunction with Union Pacific, to have the Commission restrict Milwaukee's ability to enhance its competition with the central route (App. 480-491).

Southern Pacific directly serves Portland and solicits shippers in Washington and British Columbia to route their shipments for interchange to the Southern Pacific at Portland. It competes via its central corridor Ogden, Utah route (with connections east of Ogden) and also via its southern route for the traffic between the Pacific Northwest and the eastern and southern parts of the country (see map in Appendix A).[82]

The Soo Line's vigorous competition with the applicants in the northern tier and other states was described by the president of that company. Stating that Soo Line "operates in the states of Michigan, Wisconsin, Illinois, Minnesota,

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[82] Southern Pacific's Vice President testified that "Southern Pacific substantially improved its transcontinental services in 1929 by constructing and acquiring lines of road to form the Alturas cutoff as a link between Oregon and the Pacific Northwest, and its main east-west line at Fernley, Nevada" (Tr. 4776). He further testified that "Southern Pacific also maintains strong and able solicitation forces in Oregon, Washington and British Columbia, and I am confident that their activities, coupled with the stipulation, will result in our retaining the great preponderance of the traffic now moving through the Portland interchange" (Tr. 4779).

North and South Dakota and Montana" he testified that Soo Line competes with each of the Northern Lines and with the Burlington; that it would be adversely affected by the merger unless conditions were imposed for its benefit; and that if the conditions were imposed (as they were; see pp. 80-81, above), Soo Line "will remain a strong and active competitor . . ." (Tr. 10219-24).[83]

The Soo Line connects in northwest North Dakota with its parent, Canadian Pacific, to form a northern route for transcontinental traffic (see map in Appendix A).[84] Testifying on cross examination by the attorney for the Department of Justice, the Soo Line's president stated that "many routes are competitive, depending on the origin and destination, even though they may not be in a direct straight line. For instance, we compete on west coast lumber with any line that can have routes to and from the West Coast. . . . [W]e are competing with those lines out of Chicago on west coast business. Canadian business is often competitive with U.S. lines" (Tr. 10263-64). On further questioning from the Department's attorney, the witness testified as follows (Tr. 10272-73):

> "Q. Now, Mr. Murray, do you believe that your company has been in active and vigorous competition to date with the applicant lines and its other major rail competitors?

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[83] A map of Soo Line operations is in the record (Ex. 153). Competing with the applicants at such points as Chicago, Minneapolis, St. Paul, Duluth, Superior, and Bismarck, Soo Line has parallel and separate east-west lines in North Dakota and Minnesota as well as numerous north-south lines in both of these northern tier states.

[84] Between Chicago and Seattle the Soo Line-Canadian Pacific route with connections at Sumas, Washington for the haul from the border to Seattle is 2,355 miles, almost identical with the 2,321 mileage of the Burlington-Northern Pacific route (see p. 95, n. 80, above).

A. Yes, active and vigorous competition.

Q. Do you see any reason whatsoever why, if the ICC denies this application for merger, that the active and vigorous competition which to date has existed cannot continue?

A. Well, there is going to be competition, whether there is a merger or isn't a merger."[85]

The North Western, also, competes with the applicants in two of the northern tier states and in other states and, by reason of the conditions imposed by the Commission for its benefit, North Western's competition will be extended and intensified after the merger (see pp. 77-79, above). Its lines serve such points as Duluth, Superior, Minneapolis, St. Paul, Chicago, and points in North Dakota, South Dakota, Nebraska, Wyoming and Iowa (App. 910). "C&NW is an important segment in through transcontinental routes, not only as an intermediate carrier between eastern railroads and the transcontinental lines, but also as to traffic originating and terminating in the territory it serves" (App. 910-911). As the Commission stated in its First Report, North Western "is a substantial competitor of the Northern Lines and the Burlington . . ." (App. 92).

The evidence thus firmly supports the Commission's findings that there will be substantial intramodal competition after the merger (App. 318-319) and that "the overall effect of the conditions imposed here will portend for a strong degree of intramodal competition in the affected ter-

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[85] The Department's attorney fully recognized that Soo Line is and will be an active competitor against the applicants. He explained to the Examiner that "The point is that if the merger is approved by the ICC, the applicant lines will get what they claim to be certain advantages and benefits therefrom . . . but his company will have to compete with them under that situation . . ." (Tr. 10267).

ritory" (App. 334). The merged company will be pressed by the rail competition of the Milwaukee, North Western and Soo Line (each of which will have its competitive ability increased under the conditions imposed on the merger) and by the Union Pacific, Southern Pacific and other roads. The shippers of agricultural, mineral and forest products from the Northwest who now, for the most part, have no rail competition for their shipments until they reach the terminals of the Northern Lines (pp. 66-68, 90-92, above) will obtain a choice of railroads competing for the long haul on those shipments. Shippers from and to points in the Pacific Northwest, such as those at Seattle and Portland, who now have a choice between competing routes in the northern corridor will continue to have a choice of competing northern corridor routes. They will also continue to have a choice of routing their shipments either via one of those northern corridor routes or via the central or southern corridor routes or via the Canadian Pacific-Soo Line route.

The Department asserts that the merged company would have "dominance" over rail transportation in the northern tier (D.J.Br. 18, 38). It attempts to support this assertion by the further assertion, derived from figures found in the Commission's First Report (App. 147), that the merged company would handle 61 percent of the carload traffic moving westbound and 83 percent moving eastbound from the Northwest (D.J.Br. 42). The 83 percent is incorrect; if the traffic of the Union Pacific is included, as it is in the westbound figure, the eastbound figure would be approximately 61 percent (Ex. 99, p. 12). Moreover, these figures are derived from the count of cars moved by the two Northern Lines, the Union Pacific and the Milwaukee through four gateways in the Northwest and do not include any part of the traffic to or from the Pacific Northwest that

is carried by the transcontinental routes of the Southern Pacific, the Western Pacific and Canadian transcontinental lines. With allowance both for the traffic handled via these other routes and for the fact that the merger conditions will increase Milwaukee's share of the traffic, the merged company's share would be substantially below 61 percent.[86]

Assuming, however, that the merged company will move substantially more traffic to and from the Pacific Northwest than would be moved by any other railroad, that fact does not establish that the New Company will have dominating competitive power over transportation in the northern tier. In the conditions that exist in the pervasively regulated transportation industry, the movement of a large volume of traffic does not enable a carrier either to fix prices or to exclude others from the industry. Nothing in the record in this case suggests that the merged company's traffic volume would enable it to dominate or to smother the competition of other railroads and other modes of transportation. The Commisssion found that after the merger substantial competition—both rail and intermodal—would remain and new rail competition would be created (App. 319). The abundant evidence that supports this finding shows that the merged company would not have dominating competitive power.

In an attempt to answer the holding that the revenue figures at common points exaggerate the extent of competition between the Northern Lines the Department invokes "the general importance of market competition in the rail

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[86] These figures are subject to the additional infirmity that because they do not reflect origins or destinations they do not indicate to what degree the traffic passing through the four points is competitive even among the four lines included in the statistics. They are therefore not a precise indication of competitive market shares. See p. 95, n. 81, above.

industry" (D.J.Br. 44). The Department states that two railroads serving a common market destination may compete as to shipments originating from stations each served by only one of the railroads. In the context of the facts in this case, however, "market competition" actually serves to demonstrate the magnitude of competition, by rail, truck and otherwise, operating against the Northern Lines at the markets to which the bulk of the traffic of the Northwest moves, and thus provides further proof of the limited competitive impact of their merger.

The agricultural and other products of the Northwest must move to the distant heavily populated areas of the country for consumption or use there, in competition with similar products moved to those consuming centers from producing areas closer to the centers. That market competition exerts pressure against all railroads handling those products. The products of the Northwest are not, as the Department seems to indicate, consumed at rail common points in the Northwest; the population centers are elsewhere in the country. The Examiner made the following finding in this connection (App. 738):

> "The Northern Lines have been confronted with the necessity of pricing transportation on the basic products originating in their respective territories at levels low enough to move the traffic the long distances necessary to reach the nation's great industrial and consuming markets in other sections of the country in competition with similar commodities shipped from much closer sources of supply."

The Commission noted in its Second Report that the area served by the Northern Lines "offers a limited market for its products" and stated (App. 253):

> "For this reason, the producers in the area are heavily dependent upon transportation. Because of the nature

of the products and the distances involved, rail transportation to centers of population at costs low enough to permit participation in these markets is of primary importance. There is an imbalance of traffic. The West has historically been a market for the finished products of the Midwest and the East, and a supplier to those areas of basic raw materials."

Thus, the merged company will face not only the pressures of competition from other railroads, described above, but also the pressures of market competition requiring low rates for the movement of the products of the Northwest. And the economies that will result from the merger will aid in making it possible to provide those necessary low rates.

D. Competition From Trucks and Other Modes of Transportation in Applicants' Territory Is Vigorous and Increasing.

By far the most notable transportation development in the period since the 1940's has been the dramatic increase in transportation by highways, waterways, pipelines and airlines. As the Department of Justice concedes, "railroads, in general, no longer enjoy the transportation monopoly they formerly possessed . . ." (D.J.Br. 49). Intermodal competition exerts an extensive and growing pressure on the Northern Lines and the Burlington which will continue to assure low rates and good rail service after the merger. Intermodal competition is certainly far greater today than it was in 1930 when the Commission concluded that unification of the Northern Lines would be in the public interest. *Great Northern Pacific Railway Company Acquisition*, 162 I.C.C. 37.

The Commission noted in the Second Report the large number of truck lines that serve each of the ten major terminals of the applicants, including each of their major

terminals in the northern tier, and it found that "there is, and after the merger would continue to be substantial intermodal and intramodal competition" (App. 318).[87] As the Commission stated with regard to the Class II railroad stations—where rail competition will continue in the northern tier with a smaller number of railroads—shippers at those localities "are generally served by other modes of transportation vigorously competing for traffic" (App. 319).

Finding that "Applicants are faced with growing intermodal competition" and "are losing a steadily increasing share of the transportation market going to competitors," the Commission pointed to the severe decline in applicants' pre-tax net railway operating income (App. 298-299). It found that the combined annual average income of the two Northern Lines and SP&S had fallen from $74 million in the years 1951-1955 to $48 million in the years 1961-1965, a shrinkage of $26 million in the average annual earnings and that the results for the Burlington "followed a similar pattern" (App. 299; see pp. 52-53, above). The Commission found that by reason of the merger "The improved financial posture . . . will enable applicants to become stronger and more stable, and thus be better equipped to meet the growing competition now being felt . . ." (App. 302).

The competitive ability of the other modes of transportation will continue to increase. The Commission so found (App. 298, 310):

"Construction of new superhighways and pipelines and

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[87] The Commission found that the major terminals of Great Northern and Northern Pacific have service from the following numbers of truck lines: Head-of-the-Lakes (Duluth-Superior), 18 truck lines; Portland, 45; Seattle, 35; Spokane, 15; and Twin Cities, 78 (App. 318). Exhibit 15 names the truck lines serving the respective localities, large and small, served by the applicants.

improvements in waterways presage a competitive future even more intense than the present.

• • •

"The public will also benefit from the increased ability of the applicants to meet the increased intermodal competition by providing improved, lower-cost service. Advances made over the years by other transport modes in the areas served by applicants make it imperative for the railroads to increase their competitive capability. Illustrative of these advances are plans to develop further waterways for increased barge navigation, and the completion of Interstate Highways 90-94, which will allow a reduction in truck transit time from 60 to 36 hours between the Twin Cities and Seattle."[88]

Under the heading, "Competition—Intermodal," the District Court reviewed and sustained the Commission's findings (App. 34-38). The Court stated, in part (App. 35, 36):

"There is ample evidence in the record that motor carriers are reasonable substitutes for railroads in many instances. Numerous witnesses, principally shippers, described substantial incursions by motor carriers into railroad traffic in paper products, steel, cement, fruit,

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[88] The existence of widespread intermodal competition in applicants' territory, affecting both traffic and revenues, was recognized even in the Commission's First Report (App. 135):

"Of course, the rapid growth of highway, barge, and pipeline carriers has affected the traffic and revenues of the applicants. Through unification, applicants hope to recapture a large volume of traffic that has been lost to other modes of transportation, including private and exempt for-hire carriers. The rapid growth of motor, water, and pipeline carriers, and the intensification of intermodal competition are matters of common knowledge."

The First Report also stated that "To counteract diversions of traffic by other modes, applicants have improved their services and have made many rate innovations and adjustments" (App. 139).

grain, *et cetera.* See, *e.g.*, Tr. 5754, 11836, 9527, 7224, 8023, respectively."

"The rapid growth of the trucking industry and incursion of motor transportation into railroad traffic of all types provide a substantial basis for the Commission's conclusion that motor carriers are ready substitutes for, and vigorous competitors with, rail transport in the Northern Tier."

The District Court, citing applicable decisions, noted the relevance of the Commission's consideration of intermodal competition in connection with reduction of interrailroad competition (App. 36-37). Moreover, in this case, the presence of extensive and growing intermodal competition is coupled with continuance of rail competition on almost all traffic now rail-competitive and with creation of extensive wholly-new rail competition, as shown above.

1. *Motor Carrier Competition*

Certain facts relating to the nature and extent of the vigorous motor carrier competition that exists in the areas served by the applicant lines are set forth on pages 8-10 above. Additional facts with respect to this competition are found in the detailed findings made by the Examiner (App. 776-784).

The Department attempts to minimize the importance of truck competition in the northern tier and elsewhere in the territory served by the applicants by arguing that much of the traffic in that area consists of forest, agricultural and mineral products which are not susceptible to truck competition (D.J.Br. 7, 45-46). This contention disregards the abundant record evidence that vigorous truck competition exists for agricultural, forest and other products in the northern tier as well as elsewhere. The Examiner found (App. 780):

> "For example, the range of truck competition on grains into the Twin Cities and the Head-of-the-Lakes now extends to 400-mile hauls, and where loads of grains are used for back-hauls, there is no limit as to the length of haul. At the Head-of-the-Lakes the percentage of grains arriving by truck has increased from one percent in 1957 to 22 percent in 1960 and to a higher percentage in the first seven months of 1961."

An operator of a grain elevator at Laurel, Montana (1,022 miles east of Seattle), who formerly moved all of his shipments to West Coast terminal markets via the Northern Pacific, testified as follows (Tr. 13690-91):

> "However, beginning in 1958 this situation has radically changed. In 1958, 21 per cent of my outbound grain shipments were handled by truck; 1959, 27 per cent; 1960, 58 per cent; 1961, 83 per cent, and 100 per cent by truck to date this year. . . .
>
> "My elevator was built and equipped for handling grain for rail shipment. I would prefer to use the Northern Pacific for outbound grain shipments. Further, the services developed over the years by the railroads for the marketing of grain are superior to the services which the trucks provide. However, the lower rates available by truck have virtually compelled me to use their services."

The General Manager of a grain elevator company with 27 elevators on four railroads in Montana testified regarding Montana grain that "The loss of traffic is to be feared more from the trucks than from competitive rail carriers" (Ex. 222, p. 10). The manager of the Cargill operations in that state (purchasing thousands of cars of grain annually) testified that "The losses of grain traffic by all railroads in Montana have been because of the movement of grain by truck" (Ex. 223, p. 3).

The Traffic Director of the Red River Valley Potato Growers Association submitted Exhibit 197 showing that

for the 1954-1955 season the trucks handled 20 percent of the shipments from that large Minnesota-North Dakota potato growing area but that for the 1960-1961 season the truckers' percentage of the total shipments had more than doubled, despite several reductions by the Northern Lines in their rail freight rates (Tr. 11705). Commenting on his exhibit, the witness stated (Tr. 11706):

> "The reason I am submitting this exhibit is to show the intense struggle the railroads are today having in meeting the competition of truckers. We think it highly important that the railroads be permitted to perfect a strong organization so that they can successfully provide the rates, equipment, and service to maintain themselves as a potent competitive transportation service. . . ."

Regarding fruit grown in the Northwest, the witness for Yakima Fruit and Cold Storage, Yakima, Washington, testified (Tr. 7224-25):

> "[A]t the present time, only 30 percent of the fruit we handle moves by rail. This is because of a significant shift from rail to truck in the past decade. In order to keep the railroads competitive, every opportunity must be given to the railroads to compete favorably."[89]

Regarding livestock and associated products, the witness for the Washington Wool Growers Association testified (Tr. 7242-43):

> "In the years past, railroads have handled the majority of the shipments of sheep, wool, feed and supplies for our members. Presently, because of the greater

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[89] On cross-examination, the witness testified: "I am astounded at the amount of truck movement into the Kansas City area this year" (Tr. 7227). From Yakima to Kansas City the Northern Pacific-Burlington route is approximately 1,300 miles.

versatility of trucks, the railroads now supply a relatively small proportion of the transportation requirements of our members . . .

"The faster one-line service, thus avoiding switching at the terminals, which is harmful to the animals, would make rail service more attractive."[90]

There was evidence of similar import relating to forest products. A lumber wholesaler at the Twin Cities testified (Tr. 3888):

"[T]he truly significant competition in these days is between the railroads, on the one hand, and the trucks, on the other. In so stating, I am speaking of the traffic of my own industry, even though lumber has until recently been thought of as almost entirely dependent on the railroads for long-haul transportation."[91]

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[90] Similar testimony was given by the witness for Union Stockyards Company of Fargo, North Dakota, which consigns nearly 2,000 cars of cattle, hogs and sheep via the applicant railroads each year (Tr. 11371-72):

"Most of our livestock is today being handled by truck, largely because of the superior service the trucks can render . . . If the Northern Pacific and Great Northern are to continue to enjoy a livestock movement, and we certainly want them to, it is necessary that their service be improved. This merger would not only permit us to receive better service but it would also substantially reduce their costs of operation, thus making it possible for them to be more competitive in their pricing. This is certainly necessary in the case of livestock shipments."

[91] He further stated that "Elimination of competition between the Great Northern and Northern Pacific will not be damaging to us because we have never had rail competition from many of the inland points served by but a single road; yet our rail service is just as good as from common points" (Tr. 3887-88).

A witness from International Paper Co. testified (Tr. 7432):

> "It is a well known fact the printing papers, wrapping papers and [pulpboards] have in the past moved predominantly in rail service. With the ever-increasing trends toward decentralization, warehousing and inventory control, much of this tonnage is now susceptible to truck transportation. If the railroads are going to hold or recapture this tonnage, there must be improvements in transit time, car supply and services."[92]

Regarding such basic mineral commodities as cement, salt and lime, a witness from Cutler-Magner Co. at Duluth testified (Tr. 9527-28):

> "In recent years there has been an increasing trend in the distribution of commodities such as we handle towards truck transportation including private as well as for-hire transportation. This has resulted primarily from service considerations, although costs have also been a factor. Today the competition between the various modes of transportation for our traffic is extremely intense. In my opinion it will become even more intense in the future."

The evidence shows that truck competition is no longer confined to short hauls.[93] Both motor carriers and railroads have some short-haul and some long-haul traffic but the *average* haul of the applicants is approximately the same as the average haul of the motor carriers with whom they compete (App. 35-36; see p. 10, above).

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[92] A witness from St. Regis Paper Co. described shipments of forest products from the West Coast to Chicago and the Twin Cities and stated: "we have been compelled to divert shipments from rails to highway service because of the need of rapid transit time" (Tr. 5754).

[93] For example, motor carrier authority to haul potato products and frozen foods from Washington, Oregon and Idaho to Florida and numerous other states was granted in *Garrett Freightlines, Inc.—Extension—Frozen Foods,* 98 M.C.C. 401 (1964).

For the very long-haul shipments of the kind mentioned by the Department (D.J.Br. 48, n. 38), the Commission recognized that rail transportation is still of primary importance but that intermodal competition affects the ability of the applicants to provide the necessary low rates. Referring to "animal, mineral, agricultural and forest resources" that move for long hauls, the Commission in the Second Report stated that "Because of the nature of the products and the distances involved, rail transportation to centers of population at costs low enough to permit participation in these centers is of primary importance" (App. 253). Those products, for the most part, originate at points where there is no competition between Great Northern and Northern Pacific (see pp. 67, 90-92, above) but the market competition in the distant centers requires the Northern Lines to provide low rates and good service (see pp. 101-102, above). To hold their costs down, which is necessary in order to provide those low rates, the railroads must be in a position to compete successfully with the motor carriers on manufactured goods as well as on the more basic commodities (App. 253-254).

The economies and efficiencies of this merger will begin just after merger but it will be five years before the full economies and efficiencies can be realized. During that time, the highway competition from both regulated and unregulated carriers will be intensified by completion of the new Interstate Highway System. In addition to the important reduction of road distance and truck travel time between Chicago and Seattle already mentioned (see pp. 10, 104, above; App. 310), the map of the new superhighways (Ex. 17, p. 10) shows that in the northern tier north-south highways of the new system will cut the truck time and aid the trucks on their service: (a) between Head-of-the-Lakes and St. Louis via the Twin Cities; (b) between the Canadian

border in the eastern part of North Dakota through Fargo, Sioux City and Omaha to Kansas City; (c) from the Canadian border in Montana through Great Falls, Butte, Pocatello and on to Utah; and (d) from the Canadian border in northwest Washington through Seattle, Tacoma and Portland and on through Oregon into California. Trucking operations in the northern tier and other parts of applicants' area will be speeded and costs reduced by the shorter and non-stop highway system.

2. *Water Competition*

The extensive and increasing competition from water carriers has been described above at pages 10-12, and further detailed findings appear in the Examiner's Report (App. 776-784). These descriptions confirm that among the "formidable competitive forces" operating against the applicants are heavily navigated water routes provided by the Mississippi River, the Illinois Waterway, the Missouri River, and the Columbia and Snake Rivers (App. 201-202). As the Commission stated in a recent case approving reductions in rail rates to meet truck-water and all-truck competition on grain shipments from Montana and other northwestern states, there is "hard competition" between the railroads and other forms of transportation. *Grain from Idaho, Oregon and Washington to Ports in Oregon and Washington,* 326 I.C.C. 358, 367 (1966).[94] At the eastern terminals of the

[94] Illustrating this competition, the report states: "Both truck and barge transportation increased in 1960, truck carriage totaling 634,014 tons of wheat, and barge transportation of 1,062,939 tons of grain" (*id.* at 360). Although the reduced rail rates with which the case was concerned had gone into effect in 1960, the erosion of traffic had continued: "It cannot be overlooked that the downriver movement of 1,171,191 net tons of grain in 1963 was greater than ever before, or that such movement continued at an increased rate during the first 5 months of 1964" (*id.* at 367).

Northern Lines (Twin Cities being a river port and Duluth-Superior a lake port) the same inland effects of water carrier competition prevail. See pp. 11-12, 106, above.

These competing water carrier and truck-water operations are not limited to the territories served by the Northern Lines themselves but also extend to the territory of the Burlington. Thus, shortly before the hearing in this case the Burlington was compelled to reduce its export rates on wheat from points west of the Missouri River to the Gulf ports because of the erosion of traffic moving by truck to the Missouri River ports and thence by barge to the Gulf (Tr. 544). Similar examples of such waterway competition in movements of corn, iron and steel, and coal were described in the evidence (Tr. 544, 551-552, 548-549).[95]

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[95] A portion of the testimony on the movements of iron and steel follows (Tr. 551-552):

> "In addition to the trucking, we encounter barge competition along the Mississippi, Missouri and Illinois Rivers on commodities moving in large quantities, such as plate or sheet, pipe, tin plate, et cetera. We are especially vulnerable to this competition at such points as Kansas City, Missouri, and Omaha, Nebraska, on the Missouri River and the Twin Cities on the Mississippi River on tonnage produced at Granite City and the Chicago, Illinois, district and other producing points east thereof having access to water transportation.
>
> "An example of the growth of water competition is shown on Page 8 of my exhibit. Based on a survey of receivers at St. Paul, it was developed that in 1949 they were only obtaining 2.3 per cent of their Chicago District tonnages by barge, but by 1957 this had increased to such an extent that 33.4 per cent of the tonnage came in by water. During the same period the percentage carried by truck more than doubled, and the railroads' share fell from 75 per cent to 14 per cent."

In addition to inland water traffic in the Northwest and at applicants' eastern terminals, the intermodal competition includes the competitive service of the steamships between Pacific North Coast ports and ports on the Atlantic Coast. A large volume of North Coast lumber moves by this intercoastal shipping (Tr. 433). In 1959, for example, 25 percent of the lumber shipments from moutain-Pacific territory to "official" territory (the northeast part of the country) moved by water, and lower rail rates were subsequently approved over the protest of intercoastal shipping interests and of competing producers of lumber in the Southeast. *Reduced Transcontinental Lumber Rates,* 318 I.C.C. 815, 831 (1963).

3. *Pipelines and Airlines*

The intermodal competitors include also the operators of pipelines and airlines in applicants' territory. The Examiner's Report states (App. 781-782):

> "Pipeline competition has also increased far more rapidly in the area served by applicant railroads than it has in the nation as a whole. The miles of pipelines handling petroleum products in the states served by applicant railroads have more than doubled since 1939, to a total of 28,557 miles in 1959. The pipelines now cover all the principal points served by applicant railroads except on the western coastal points, and those points [are] served by water lines. In addition, a greater network of natural gas to the communities served by applicant railroads in competition with and displacing the coal which applicant railroads formerly handled.
>
> • • •
>
> "A network of scheduled airlines serves the communities located throughout the system lines of applicant railroads. Not only does the record reflect domination by that mode in the long haul passenger field, but also

> the fact that they and specialized freight airlines are competing with increasing success for the high revenue freight."[96]

In the years immediately ahead, the railroads will be faced with a significant expansion of airfreight through the use of jumbo jets, particularly for the long hauls of higher-rated commodities, which parallels the expected intensification of motor carrier competition upon completion of the superhighway system.

E. The Commission Properly Gave Weight to the Widespread Shipper Support for the Merger.

Under Section 5(2) of the Interstate Commerce Act the Commission is required to "estimate the scope and appraise the effects of the curtailment of competition" which will result from a proposed merger, "consider them along with the advantages of improved service, safer operation, lower cost, etc." and then determine whether the merger will assist in effectuating the National Transportation Policy. *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87. In discharging this obligation the Commission must ultimately exercise its own expert and informed judgment. But in evaluating the evidence before it the Commission is entitled to, and indeed should, give appropriate regard to the testimony of shippers whose interests will be affected by the merger.

The impact of a merger will operate directly upon those shippers and their own self interest will impel them to examine critically both its asserted benefits and its asserted detriments. The shippers have first hand information about

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[96] The Second Report shows that each of the applicants' ten major terminals, including the five in the northern tier states, is served by numerous airlines (App. 318).

their own transportation necessities and about the services and facilities that are involved in or that may be affected by a proposed merger. The shippers are therefore in a particularly advantageous position to make a practical judgment on the potential effects of the merger. For these reasons their testimony on the potential effects of a proposed merger is of particular importance. *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19 (E.D. Mich. 1963), aff'd *per curiam* 375 U.S. 216.[97]

It has been pointed out above that one of the remarkable aspects of this proceeding is the practically unanimous support of the merger, as conditioned, by shippers speaking either individually or through their authorized associations (see pp. 15-16, 19-20, above). Similar support came from states or other public bodies. The United States Department of Agriculture, which is the largest shipper of agricultural products in the country, dropped its initial opposition and was one of the parties that informed the Commission of the benefits that the merger, as conditioned, would bring to the producers and shippers (see pp. 69-70, above).

The Commission recognized the significance of this shipper testimony and expressly stated (App. 320) that it had accorded

> "great weight to the testimony of the many shippers, associations, and other groups who supported the merger often with express recognition that some competition would be eliminated or reduced. Many witnesses from within the northern tier, including some

[97] The case involved the C&O-B&O unification. The District Court there stated (*id.* at 26): "Shippers are the primary source of all freight traffic and their opinions are, accordingly, of impressive weight."

> of the class I and class II points, supported the merger in one form or another . . . On balance, in concluding that loss or reduction of competition between GN and NP in the northern tier does not require denial of the applications, we believe considerable weight should be given to the testimony of those witnesses supporting the merger—including particularly that pertaining to the users of rail service in those areas most immediately concerned."

The Department appears to take the position that it was error for the Commission to accord weight to this testimony. To support this position the Department argues in effect that the Commission should have rejected, or dismissed as inconsequential, shipper testimony relating to the specific benefits of this merger and expressing support for its approval, and that it should have considered only those portions of the testimony of shippers which recognized that there were abstract advantages in the preservation of some rail competition (D.J.Br. 60). This eclectic treatment of the shipper testimony simply disregards the fact that the shippers while recognizing the benefits of competition expressed the view that in the instant case the benefits of the merger outweighed the lessening of competition. Because of the volume of the shipper testimony no detailed summary of its contents is feasible here. The examples set forth below, however, will serve to show the force of the evidence that was presented by the shippers.

In testimony typical of the many shipper witnesses, the traffic representative of National Biscuit Company stated that shipper's evaluation of the importance of the merger benefits as compared to the elimination of competition as between the merging roads (Tr. 8271):

> "Because of the vital interest National Biscuit Company has in rail transportation within the area served

by the applicant lines, it has carefully considered the application now being heard by your Commission, and in so doing has reached the conclusion that the transportation services and facilities available to it will be substantially improved by the approval of this application."

With respect to competition he testified (Tr. 8274-75):

"Q. In reaching your position in support of the applicants, have you considered the effect of the elimination of competition as between the applicant railroads in this current proceeding?

"A. Yes.

"Q. And did you find that this would have any adverse effect upon you as a user of the transportation service of these companies?

"A. No.

"Q. Why did you reach that conclusion?

"A. I feel that the joining of these lines as one railroad line will give to us an operating unit that can serve our needs and will be still operating in a competitive field not only the competition of the other rail carriers but possibly more important the competition of other modes of transportation, including barge, common and contract carriage, certainly private and exempt carriage."[98]

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[98] Also typical was the expression by the general traffic manager of the Quaker Oats Co. (Tr. 8050):

"If we could have a good strong railroad system and everything that went with it, including good car supply and good service, and on top of that if we could have a whole lot of competition that would be all right, but we have just reached the point in this country that we can't afford to have all this competition because there is too much competition from other forms of transportation."

Such testimony reflects the knowledge of shippers that strong rail competition and vigorous competition from other transportation modes will be present after the merger and that reduction in the number of railroads is far less important than are the merger's benefits to the public.

The Department quotes one shipper and cites testimony of numerous other shippers on the abstract issue of whether competition is desirable in a manner that may give an incorrect impression of their views on the immediate question whether the present merger should be approved (D.J. Br. 60-61). Thus, the single witness quoted by the Department—who spoke principally about a Madison, Wisconsin plant served not by any of the applicants but rather by the Milwaukee, North Western and Illinois Central railroads—supported the conditions proposed by the Milwaukee Road and the North Western, but was in no way opposed to the merger if made subject to the proposed conditions that have been imposed by the Commission (Tr. 9051).[99]

Almost all of the many witnesses whose testimony is cited in footnote 47 on pages 60 and 61 of the Department's brief as "demonstrating the importance of railroad competition to shippers in the territory involved" were witnesses who testified in affirmative and definite support of the

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[99] The testimony of the same witness on cross-examination by the Department's counsel is contradictory to the Department's present effort to picture the Milwaukee as a weak competitor (Tr. 9069):

> "Q. (By Mr. Howard) Based on your experience and knowledge, Mr. Shuler, do you believe that the Milwaukee Road has to date been in active and vigorous competition with the Applicant lines and its other rail competitors?
>
> "A. Yes, I do, and I want to keep them that way."

Further testimony of the same witness that more than half of his company's shipments move by truck is illustrative of the intense intermodal competition (Tr. 9066).

merger as approved. For instance, the first witness cited in the Department's long footnote supported the merger as a step toward improved service and lower rates (Tr. 4121-22). He stated (Tr. 4122):

> "I know of no other means available to these railroads which could produce these improvements in service and car supply [and] at the same time reduce costs. Accordingly, we favor the merger and urge the Commission to authorize it."

The second witness cited in the Department's footnote supported the merger because it would provide him with better service and car supply (Tr. 4545). The third supported it as a way of improving service and reducing the pressure on railroads to increase rates (Tr. 6117-18). The fourth did so because it would help speed his shipments and make available more of the long gondola cars he needs (Tr. 6128). The fifth and sixth witnesses cited, representing the Tacoma and Seattle Chambers of Commerce, urged approval of the merger because it would benefit their cities through better rail service (Tr. 6166, 6209).[100]

The conclusions of almost all of the 100 other witnesses cited by the Department in the footnote were similar to those of the first six. Many testified that the real competition now is not between the railroads so much as between the railroads and other carriers, principally truckers.[101] For example, when the Department's counsel suggested to one witness that "active rail competition" produces lower

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[100] The Seattle witness testified that the merger is "a definite step in the right direction" in order to maintain effective transportation competition in that area and to keep Seattle shippers competitive with shippers in other areas (Tr. 6209).

[101] Tr. 4121, 5743-44, 6547, 7158, 7225, 7241, 7242-43, 7432, 7461, 7483, 7527, 7669, 7929, 10120-21, 11061-62, 11100-01, 11555.

rates, he testified as follows: "My feeling about that is that in the distant past it did, but in the more recent past it hasn't" (Tr. 10121). The witness also testified that "the railroad's competition basically is not with another railroad but with another form of transportation" (Tr. 10120). Another witness cited by the Department, the manager of a steel company's transportation activities, had opposed certain other rail mergers (Tr. 7902) but urged approval of this merger and summed up the views of the shippers (Tr. 7901):

> "We just want a better transportation service at a better cost, everything considered,—we believe this merger will do just that."

The views of the shipping and producing public throughout the Northwest are directly in accord with the Commission's findings and conclusions (App. 344):

> "Like the many shippers who support the applicants and who do business in the said States, and like the numerous States, State and Federal agencies, communities and shipper groups which have dropped their opposition and now favor the merger, we see this transaction as a means for achieving, through appropriate conditions, overriding benefits to the public through improved transportation. . . . Viewing the considerations anew, we conclude that the proposals, with requisite conditions, are entirely consistent with the public interest."

III. THE CONTENTIONS OF CITY OF AUBURN ARE WITHOUT MERIT.

The City of Auburn argues that the Commission's approval of the merger is not supported by adequate findings on a complete and current record showing that the merger benefits for the public "convincingly outweigh" an

alleged "infliction of severe economic injury on the City of Auburn" (Auburn Br. 2).[102] Auburn's contentions were reviewed and found lacking in merit by the Examiner (App. 998-999, 1092-1096), by the Commission (App. 334-336) and by the District Court (App. 52-53).

Auburn is located in the Seattle area, a short distance south of Seattle, and now has a population of 19,000 (Auburn Br. 3). Three railroads (Union Pacific, Milwaukee and the merged company) will serve this small community after the merger, competing for transcontinental and other shipments. Northern Pacific operates a yard at Auburn as the terminal for its transcontinental trains, and the yard is used to handle all the Northern Pacific cars in the Seattle area. It employs a substantial number of employees there (approximately 500 at the time of the hearing before the Commission (App. 999)). The original plan was to close that yard after the merger. Calculating that a large part of the employees' wages is now spent in Auburn, the city is interested in retaining the local payroll (Auburn Br. 3).

Auburn's argument (Auburn Br. 5-7) that the Commission should have reopened the record to receive further evidence is invalid both because it is belated and because the interim development to which it refers will result in there being no reduction in employment at Auburn as a result of the merger.

Auburn never petitioned the Commission for a reopening on any subject. Auburn offered no evidence at the reopened hearings in 1967. It filed no brief with the Commission when briefs were being filed later in 1967 on the Commis-

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[102] Although Auburn refers in its Questions Presented to the matter of merger benefits as compared with reduction of competition, it simply joins in the brief of the Department on that subject.

sion's reconsideration of all issues and it filed no petition for reconsideration of the Commission's 1967 report approving the merger.[103]

Moreover, the principal circumstance referred to by Auburn as having occurred since the record at the original hearing was closed is favorable rather than harmful to Auburn. As Auburn states, the original plan was that upon merger "the Auburn yard would be closed" (Auburn Br. 3). Auburn states in its brief that applicants have "altered their plans for the Auburn yards (see the opinion of the district court, App. p. 53 n. 24)" (Auburn Br. 5). The District Court's footnote 24 reads as follows (App. 53):

> "The President of Northern Pacific filed an affidavit in Auburn's suit against the United States [(W.D. Washington) Civil No. 7706, filed May 3, 1968] to the effect that the Auburn yard would be maintained."[104]

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[103] In May, 1968, Auburn brought suit, Civil No. 7706, in the United States District Court for the Western District of Washington (Northern Division) to set aside the Commission's order. After its request for a stay of that order was denied, Auburn intervened in the suit brought by the Department in the court below.

[104] President Menk of the Northern Pacific stated in his affidavit "that as a result of the economic growth and of the increase in trailer-on-flatcar and container-on-flatcar traffic, the merged company will not shift Auburn Yard operations to South Seattle as was initially planned and will instead construct facilities for handling additional traffic in Auburn; that the locomotive facilities at Auburn will continue to be used; that the large Northern Pacific yard at Auburn will be retained and improved and will remain at least at the existing level of use as a key maintenance and switching facility on the new system; that employment at Auburn will not be reduced as a result of the merger; . . ." (Par. III). Similarly, Vice President Eckart of Great Northern stated in his affidavit "That the merger will not result in any reduction of employment in the City of Auburn; that it was formerly contemplated that following the merger the Northern Pacific Railway Company's yard at Auburn would be closed and that the functions of that yard would be transferred to a new one to be constructed

Thus Auburn, by reason of the interim development, now will retain the benefits of having the yard employees' wages spent in Auburn. The change plainly affords no basis for Auburn's contention that the record should be reopened.

Auburn incorrectly states that the merger "would reduce Auburn's freight service to one local train daily in each direction between Auburn and Yakima" and refers to what it describes as a "relegation of the city to once-a-day local connecting freight service" (Auburn Br. 3, 5). It completely omits mention of the services of Union Pacific and Milwaukee available to the shippers and receivers at Auburn. Moreover, Auburn's description of post-merger service by the merged company is inaccurate. The merged company's daily freight service there will include two eastbound trains on the Auburn-Yakima line and two such westbound trains plus the service between Auburn and the merged company's Interbay yard at Seattle for connection with the expedited transcontinental east-west freight trains and plus service by north-south trains.[105] Auburn's rail

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at South Seattle; that major changes have taken place in the Puget Sound region, and the area surrounding Auburn in particular, which have caused such plan to be abandoned; . . ." (Par. V).

[105] Northern Pacific's General Superintendent of Transportation, C. W. Thompson, in his affidavit filed in Auburn's suit in the Western District of Washington, set out the details of the freight service operations for Auburn after merger day ("M Day"), stating, in part: "Through freight service northbound and southbound at Auburn will be better after M Day than it is today. . . . [F]rom Auburn through Yakima. . . . [a]fter M Day we propose to operate two trains daily in each direction. In addition, there will be movement of traffic between Auburn and Seattle (Interbay) for connection with expedited transcontinental east-west freight trains. Through freight service eastbound and westbound will be better after M Day than it is today. . . . Local and transfer service at Auburn after M Day will be at least equal to that presently performed" (Pars. IV-VI).

transportation service will be ample and both the east-west and north-south service by the merged company will be better than it is today.

There is no merit in Auburn's argument that the merger approval should be set aside because the western terminal for Northern Pacific's transcontinental trains is now at Auburn whereas the merged company's terminal for transcontinental trains will be elsewhere in the Seattle area and those trains will move to and from the Seattle area on Great Northern tracks. The merger will make it possible for the merged company to use "the shortest or most efficient routes" (App. 305) and the change of Auburn's status as the Northern Pacific's western terminal is incidental to the improvement of service for all shippers. The preferred route for the through transcontinental trains, after the merger, will include the efficient Great Northern route via Everett for the haul across the Cascade Mountains to or from Spokane rather than the Northern Pacific Stampede Pass route between Auburn and Spokane via Yakima—although the latter route will also be used (in addition to its regular local service) as a "secondary main line through freight route" (App. 660, 998). As Auburn acknowledged at page 7 of its brief to the court below: "The Great Northern line from Everett east via Cascade Tunnel, moreover, averages a less severe grade than the Stampede Pass route from Auburn." Better service and more economical transportation will result from the use of the line having the less severe grade.

The lack of merit in Auburn's alleged concern about Auburn's shippers who route shipments over the central corridor routes in which Denver & Rio Grande Western Railroad participates (Auburn Br. 6) is indicated by the fact that neither those shippers nor the Rio Grande have

joined the city in its appeal from the Commission's order. Rio Grande's interests have been protected by a special condition imposed by the Commission (App. 341-342, 478-480).

There is also no merit in Auburn's argument that reasoned findings were not made as to its contentions. The Examiner fully summarized Auburn's evidence and its arguments (App. 998, 999) and then stated his reasons, citing relevant decisions, for holding that a community's interest in such matters as the local spending of railroad employees' wages must give way to the duty of a railroad to provide adequate and efficient transportation service to all of the public it serves (App. 1092-1096). The Commission did not nor was it necessary for it to repeat the details of this discussion, but it, too, expressed the reasons for its decision in this respect. It referred to the "impact upon . . . such communities as Auburn . . .", found that the economic disturbances "would be primarily in the nature of temporary dislocations"[106] and further stated (App. 335-336):

> "As indicated in our discussion of statutory criteria, the primary concern of this Commission herein is the development of an efficient and economical transportation system. Our particular area of responsibility is found in the Interstate Commerce Act, and while our consideration necessarily extends to other matters affecting the well-being of the several States and communities, we must look to the act for the standards governing unifications of this nature. The record does

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[106] Auburn's population growth from 11,000 in 1960 (App. 998) to its present 19,000 confirms the prediction of a Seattle economist for the Milwaukee that the prospective economic growth at Auburn would "within a reasonable period of time offset that temporary employment disadvantage" (Tr. 6836).

not show, moreover, that the transportation requirements or the well-being of these areas and communities would best be served by denial of these applications. To the contrary, the evidence does not indicate any long-range, serious adverse effect on them. In our view, these mergers, suitably conditioned, augur an era of increased railroad strength, both in intermodal and intramodal competitive aspects in the long run resulting in a benefit to, and not a burden on, communities in the northern tier States."

In *Penn-Central Merger Cases*, 389 U.S. 486, the City of Scranton and Borough of Moosic contended that they would suffer from curtailment of service and sought to set aside the Commission's approval of the merger. This Court rejected the contentions of those municipalities and added that their claims "may be asserted in appropriate proceedings when such curtailment is specifically proposed" (389 U.S. at 504). So may the City of Auburn assert any such claims. Furthermore, the Commission here has expressly provided in its order that "the jurisdiction of this Commission in these proceedings be, and it is hereby, expressly retained for a period of 5 years from the date of the effectiveness hereof for the purpose of making such further order or orders in these proceedings as may be necessary or appropriate; . . ." (App. 462). Auburn not only will have improved service but also is amply protected.

IV. THE DEPARTMENT'S ALLEGED GUIDELINES ARE INCONSISTENT WITH THE INTERSTATE COMMERCE ACT AND CONFLICT WITH THE DECISIONS OF THIS COURT.

The Department of Justice argues that the Commission erred as a matter of law by failing to apply "the proper legal standard" and that Section 5(2) embodies "guide-

lines" that required the Commission to disapprove this merger (D.J.Br. 61, 63, 64). The Department's argument starts with the general proposition that as a matter of law the Commission cannot approve a merger that eliminates "substantial competition" except upon a showing that the merger will meet a "special" or "serious transportation need or provide other important public benefits" (D.J.Br. 22-23, 36, 56).[107] In the present case the Commission found that the merger as conditioned would enable the applicants, the Milwaukee, and other railroads to provide better and more efficient and economical transportation service to the benefit of the shippers, the applicants and their employees, other railroads, and the public generally, (see pp. 41-81, above). The Department dismisses these benefits as insufficient in law to warrant approval of a merger that eliminates "substantial competition" (D.J.Br. 20, 61). It asserts that Section 5(2) contains standards or "guidelines" that prohibit approval of such a merger unless it will bring benefits that are more extraordinary and of

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[107] The Department exaggerates the quantitative extent of the competition that now exists between the two Northern Lines (see pp. 83-85, 89-92, above). What is more to the point, the Department assumes, without warrant, that the elimination of that competition will have an adverse effect on the quality, economy and efficiency of the transportation services available to the public. Under the public interest standard of Section 5(2), it is the practical effect on transportation that is important in determining whether the benefits of a merger outweigh its adverse effects. In this case the evidence shows, and the Commission found, that the elimination of existing competition between the two Northern Lines will have only limited economic significance because of the vigorous existing competition of other railroads, the enhanced power of the Milwaukee, North Western and Soo as a result of merger conditions, and the strong and growing competition from trucks and other modes of transportation (see pp. 81-114, above).

greater magnitude than the provision of better and more efficient and economical transportation service.[108]

The Department's alleged guidelines cannot be found in any provision of the Interstate Commerce Act. The Act gives specific content to its public interest standard in terms of the benefits of better, more economical and efficient transportation service. Section 5(2)(c) requires the Commission to give weight to the effect of a proposed merger upon "adequate transportation service to the public." And the declaration of the National Transportation Policy states that one of its main objectives is the promotion of "safe, adequate, economical and efficient service." These provisions indicate that Congress regarded the benefits of improved transportation service as exactly the kind of benefits that would justify approval of a merger which, in the Department's view, would have a significant adverse effect upon competition.

The Department's lengthy discussion of legislative history (D.J.Br. 29-36) reveals nothing that detracts from the emphasis that the Interstate Commerce Act and the National Transportation Policy give to improvements in transportation service. Nothing in that legislative history

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[108] The Department does not attempt to state any principle for determining when benefits are sufficiently extraordinary or special to allow a merger of competing carriers. To the extent that the Department's argument is specific, however, it suggests that the Department believes that the Commission's authority should be controlled by the "failing company" doctrine developed under the antitrust laws. Thus it appears to argue that the Commission may not approve a merger that eliminates significant competition unless the merging carriers are in such "precarious financial condition" that they cannot or may not provide adequate transportation service (D.J.Br. 21, 56, 58) or unless their merger is the only way to save another carrier whose transportation services are threatened (D.J.Br. 21).

suggests that Congress embodied in the Act any "guidelines" which, as a matter of law, make Commission approval of a merger which eliminates significant competition dependent upon a finding of benefits above and beyond the benefits of better transportation service.[109]

The Department's argument cannot be reconciled with the decisions interpreting and applying the provisions of the Interstate Commerce Act. Long ago this Court recognized that the Act authorizes the Commission to approve control of one carrier by another where it leads to improved transportation service even though it eliminates competition between the carriers involved. In *New York Central Securities Corp.* v. *United States*, 287 U.S. 12, 26, the Court held that "The question whether the acquisition of control in the case of competing carriers will aid in preventing an injurious waste and in securing more efficient transportation service is thus committed to the judgment of the administrative agency upon the facts developed in the particular case."[110]

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[109] After reviewing the legislative history of the Transportation Acts of 1920 and 1940, the Department asserts that "the net effect of the 1940 amendments, therefore, was to *increase*, not to decrease, the Commission's responsibility to make a critical examination of each particular merger proposal" (D.J.Br. 36; italics by the Department). Neither the cited materials nor the Department's asserted conclusion in any way suggests that the 1940 Act established new statutory "guidelines" which require the Commission to discount or to depreciate the benefits of improved transportation service in any case in which a proposed merger will remove significant competition. As previously shown, the Commission fully discharged its responsibility to make a critical examination of this merger.

[110] That case arose under the provisions of the Transportation Act of 1920 which required Commission approval for acquisition of one carrier by another. The 1920 Act stated the applicable standard

In cases arising under the Transportation Act of 194 this Court has sustained the Commission when it has approved mergers on the ground that they would promot better and more efficient and economical transportatio service, even though the transactions eliminated substantia competition and even though there was no showing of th "special" and extraordinary benefits which the Departmen argues are required by its alleged statutory guideline *McLean Trucking Co.* v. *United States*, 321 U.S. 67; *Florid East Coast Ry. Co.* v. *United States*, 259 F. Supp. 993 (M.D. Fla. 1966), aff'd *per curiam* 386 U.S. 544 (*Seaboard-Coast Line* merger).

The Department attempts to distinguish the *McLean* and *Seaboard-Coast Line* cases on the ground that the anti-competitive consequences of the transactions there involved were not as severe as those that it asserts will exist in the present case (D.J.Br. 21, 25-26, 29 n. 16). In those cases the adverse impact on competition was at least as great as the alleged impact here.[111] In any event, whether the

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in terms of "the public interest" as does the Transportation Act of 1940 with respect to mergers and consolidations. In its opinion the Court noted: "The public interest is served by economy and efficiency in operation" (287 U.S. at 23). It also stated: "The fact that the carriers' lines are parallel and competing cannot be deemed to affect the validity of the authority conferred upon the Commission" (*id.* at 25).

[111] The *McLean* case involved the merger of seven large motor carriers. The resulting company was the largest single motor carrier in the United States and no other single motor carrier competed with it throughout its service area. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 70, 71. The Department points out that in *McLean* the Commission found that substantial competition would remain after the merger (D.J.Br. 25-26). The Commission made similar findings here, which are supported by substantial evidence (see pp. 25-26, 64, 93-114, above). For discussion of the competitive effects in the *Seaboard-Coast Line* case, see pp. 85-86, 89, n. 75, above.

impact in those cases was or was not less "severe" than it is claimed to be here, the fact remains that in both *McLean* and *Seaboard-Coast Line* the merger eliminated substantial competition among the carriers involved.[112] In each of the two cases the Commission in approving the merger relied upon transportation benefits which the Department argues here are "conventional" and not entitled to "special weight" (D.J.Br. 20, 59).[113] In neither case was there any showing of the kind that the Department argues is required as a matter of law by statutory "guidelines," and the decisions sustaining the Commission's orders therefore plainly demonstrate that no such showing is required.

These decisions also dispose of the Department's attempt to read into Section 5(2) legal "guidelines" that preclude the Commission from giving weight to savings or to improvements in the financial position of the carriers involved unless there is a showing that those carriers are in a "precarious financial position" or their transportation service is already inadequate (D.J.Br. 20, 21, 58, 61). The seven carriers involved in *McLean* were all prosperous and the Court there specifically rejected the argument that the Commission should not approve a merger of competing carriers

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[112] See *Associated Transport, Inc.—Control and Consolidation—Arrow Carrier Corp.*, 38 M.C.C. 137, 150-165 (1942), for the Commission's findings describing the anticompetitive effects of the merger in the *McLean* case. In the hearing on the merits of the Commission's order in the *Seaboard-Coast Line* case the Department asserted that the merger would have "substantial adverse effects upon competition" (Supplemental Brief for the United States upon Remand from Supreme Court, p. 7, filed in Civil Action No. 64-64-Civ.-J (M.D.Fla.), Jan. 1966).

[113] *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 88-89; *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. 933, 1009 (M.D.Fla. 1966).

absent a showing that inadequate transportation facilities would be made adequate by the merger. *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 86.[114] In the *Seaboard-Coast Line* merger the two carriers involved were not in precarious financial condition but were prosperous and flourishing, at least by the Department's standards, and there was no showing that they were financially incapable of providing adequate transportation service (259 F. Supp. at 1010, 1013; see pp. 54-55, 61, 85, n. 71, above).

Penn-Central Merger Cases, 389 U.S. 486, does not support the Department's position that benefits going beyond improved transportation service are required to justify a merger eliminating significant competition or that savings are to be ignored unless a carrier or its transportation service are already in peril. The Department emphasizes (D.J.Br. 27-28) that one of the benefits of that merger was that it made possible the preservation of the New Haven by requiring its inclusion in the merged company.[115] The Court's opinion, however, does not suggest that the other benefits of the Penn-Central merger would not have justified its approval even if the New Haven had never existed.[116]

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[114] See also the statement about the *McLean* case (quoted on p. 61, above) in *Florida East Coast Ry. Co.* v. *United States*, 259 F. Supp. at 1010.

[115] So in the present case will the Commission approval of the merger make it possible to strengthen the competitive capacity of the Milwaukee and the North Western, opening new routes and service areas to those carriers (see pp. 64-79, above).

[116] Although the inclusion of the New Haven was an important consideration, the Commission expressly found that the other benefits of the merger in terms of better transportation service and savings for the carriers were in themselves sufficient to warrant approval:

> "To place the NH problem in perspective, we first note that at the time of our first report in these proceedings the public

In describing the benefits of the merger this Court expressly referred to Commission findings that the merger "would enable the unified company to 'accelerate investments in transportation property and continually modernize plant and equipment . . . and provide more and better service.' 327 I.C.C. 475, 501-502" (389 U.S. at 501).[117] Certainly there is nothing in this Court's decision establishing that the Interstate Commerce Act contains statutory "guidelines" requiring an extraordinary benefit comparable to the preservation of the New Haven in order to approve any merger that significantly reduces competition, or as a condition of considering the savings and transportation improvements the merger will produce.

Nor is the Department's argument supported by *Federal Maritime Commission* v. *Svenska Amerika Linien*, 390 U.S. 238 (D.J.Br. 28-29). Neither the Court nor the Maritime Commission held that substantial improvements in transportation service could not meet a "serious" transportation need, secure "important" public benefits or advance valid regulatory purposes. Far from weighing the importance of improvements in service as against restrictions on competition, the Maritime Commission found in substance that

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interest considerations affecting the entire eastern district, and even territory beyond, justified the approval of the Penn-Central merger despite the weak position of NH. Certainly, the plight of that company was not reason enough to deny the public in general and the shipping public in particular the many economic and transportation benefits the Penn-Central merger will produce." *Pennsylvania Railroad Company—Merger—New York Central Railroad Company*, 331 I.C.C. 643, 653 (1967).

[117] The Court also noted that "the Pennsylvania and the New York Central, as individual systems, have operated at a profit, and that there are reasonably good prospects for a continuation of such operation" (389 U.S. at 500).

the contracts there involved would provide no improvements in service whatsoever but in fact would be detrimental. *Investigation of Passenger Steamship Conferences Regarding Travel Agents,* 10 F.M.C. 27, 44, 46. There is therefore no warrant for the Department's attempt to represent that case as reading into the Shipping Act, or the Interstate Commerce Act, statutory "guidelines" that make it unlawful for an agency to approve a merger which significantly restricts competition unless there is proof of benefits above and beyond the benefits that come from better, more economical and more efficient transportation service.

The Department seeks to support its alleged statutory "guidelines" with a number of generalized assertions attacking the importance of improvements in transportation service, savings to carriers and other similar transportation benefits. It declares, for example, that carriers' estimates of savings "generally fall short" of achievement (D.J.Br. 56-57); that large mergers often produce "diseconomies of scale" (*id.* at 56); and that "many" improvements in transportation service can be achieved without merger (*id.* at 59). These assertions are not, of course, rules of decision embodied in the Interstate Commerce Act. Whether or not the assertions might be true in some other case would necessarily depend upon an evaluation of the particular facts there involved. They are demonstrably not true in this case as the Commission's findings and the substantial evidence that supports them fully establish.[118]

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[118] Evidence bearing on the Department's generalized assertions is discussed in earlier sections of this brief. For example, various aspects of the Department's argument that without the merger the applicants could achieve the benefits of the merger by coordinations and other means are discussed at pages 51, n. 42, 59-60, 70, n. 59, above. In making this argument the Department

The Department's statutory "guidelines" in reality represent an attempt to replace the policies of the Interstate Commerce Act with those of the antitrust laws. Congress, however, obviously did not believe that competition itself was the paramount means of promoting the public interest in railroad transportation when it subjected the industry to a pervasive regulatory plan covering rates, practices, investment, entry and withdrawal. It was precisely because Congress determined that competition alone could not be relied upon to produce efficiencies, savings, and other transportation benefits that—as an integral part of the regulatory plan—it authorized the Commission to approve the merger of competing carriers and relieved approved mergers from the effects of the antitrust laws. *McLean, Penn-Central,* and other decisions of this Court discussed above confirm that the policy of antitrust laws which gives paramount importance to competition is not the controlling consideration in railroad merger procedings.[119]

The Department's statutory "guidelines" are objectionable not only because of the particular antitrust bias they embody but also on the broader ground that they are basically inconsistent with the plan of regulation embodied in

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ignores the fact that to achieve all or any significant number of the improvements in service that will follow from the merger, the two Northern Lines, under separate operation, would have to establish a relationship and engage in practices that would hardly promote or preserve vigorous competition between them. *Cf. Citizens Publishing Co.* v. *United States,* 394 U.S. 131.

[119] In *Penn-Central Merger Cases,* 389 U.S. 486, 499-500, this Court said that "the policy of Congress, set forth in the Transportation Act, to consolidate the railroads of this Nation into a 'limited number of systems' is a variation from our traditional national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation. Competition is merely one consideration here." See also pp. 38-40, above.

Section 5(2). Congress recognized that the task of determining whether particular mergers are in the public interest "is a complex task which requires extensive facilities, expert judgment and considerable knowledge of the transportation industry." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 87. Accordingly, in adopting Section 5(2) Congress left to the Commission the task of applying the general standards and directions of the statute to the facts of each particular case. Thus it directed the Commission to approve such merger proposals as it finds to be "consistent with the public interest" (Section 5(2)(b)). That standard is given content by the National Transportation Policy, and Congress specified certain general considerations to which the Commission is directed to give weight (Section 5(2)(c)). The Commission must support its ultimate determination by reasoned findings that are supported by substantial evidence. The Commission's discretion, therefore, is not unlimited. But neither the general statutory standard nor the decisions of this Court applying that standard prescribe "guidelines" that control, cabin and direct the Commission's exercise of judgment in a particular case by dictating the precise weight and significance that it should give to competition, or any other adverse effect of a proposed merger, as against the transportation benefits that the merger will achieve.

In defining the standards that apply on judicial review of Commission orders this Court has said that it will "not inquire whether the merger satisfies our own conception of the public interest"; that "determination of the factors relevant to the public interest is entrusted by the law primarily to the Commission, subject to the standards of the governing statute"; and that the "judicial task is to determine whether the Commission has proceeded in accordance with law and whether its findings and conclusions accord with the statutory standards and are supported by substan-

tial evidence." *Penn-Central Merger Cases,* 389 U.S. 486, 498-499; accord, *McLean Trucking Co.* v. *United States,* 321 U.S. 67, 87-88; *Minneapolis & St. L. Ry. Co.* v. *United States,* 361 U.S. 173, 187-188, 189. See also *Brotherhood of Maintenance of Way Employees* v. *United States,* 221 F. Supp. 19, 24 (E.D. Mich. 1963), aff'd *per curiam* 375 U.S. 216; *Seaboard Air Line R. Co.* v. *United States,* 382 U.S. 154, 157; *Florida East Coast Ry. Co.* v. *United States,* 259 F. Supp. 993, 1012 (M.D. Fla. 1966), aff'd *per curiam* 386 U.S. 544.

The Department's arguments cannot be reconciled with these standards of review. The argument that the Commission disregarded the controlling statutory criteria is in substance a quarrel with the Commission over its appraisal of the evidence, over the inferences and conclusions that the Commission drew from the evidence, and over the value judgments that it made in its ultimate assessment of the public interest.[120] The Department believes that in that

[120] This is evident from the Department's own words. For example the Department asserts that the Commission "attempted to play down the competitive effects" of the merger (D.J.Br. 39); that it "seriously understates" the competitive impact of the proposal (D.J.Br. 40); that it attempted "to minimize" the common point data (D.J.Br. 44); that "the Milwaukee conditions are not enough to counterbalance the significant competitive [illegible]s resulting from the merger" (D.J.Br. 53); that the Commission's reliance upon the carriers' estimates of savings "is plainly undesirable" (D.J.Br. 58); that it should not have given "special weight" to improvements in routing and scheduling or to other operating efficiencies (D.J.Br. 59); that "the conventional merger benefits to which the Second Report points fall far short of rising to the level of important public benefits that could properly be regarded as countervailing the serious public detriments" of the merger (D.J.Br. 61); and that there is "no justification for concluding either that the anticompetitive effects of the merger would not be serious or that any transportation needs or public benefits were involved that would outweigh the serious anticompetitive effects" (D.J.Br. 64).

assessment the Commission gave excessive importance to improved and more economical and efficient transportation service and to the consequent benefits to shippers and to the public, on the one hand, and too little importance to the continuation of competition between the two Northern Lines, on the other. In short, the Department questions the wisdom of a decision on a question of regulatory policy which Congress has committed to the judgment of the Commission.

The Commission in this case considered every matter that it was required to consider by the provisions of Section 5(2) and by the decisions of this Court. It found that the merger as conditioned would benefit shippers and the public by providing better and more economical transportation service. It found that although the merger would eliminate competition between the two Northern Lines, substantial rail competition would remain for nearly all of the traffic in the northern tier that is now subject to rail competition and that the competitive power of the Milwaukee and other railroads would be significantly enhanced by the conditions attached to approval of the merger. In addition, the Commission found that vigorous intermodal competition would exist in the northern tier and throughout the system of the merged company. These findings are supported by substantial evidence and provide a reasoned basis for the Commission's determination that the merger will produce overriding transportation benefits that outweigh the effects of loss of competition between the two Northern Lines.

CONCLUSION

For the reasons stated above, the decision of the District Court dismissing the complaints of the Department of Justice and the City of Auburn was correct and should be affirmed.

Respectfully submitted,

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